

(29,622)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 330.

DAYTON-GOOSE CREEK RAILWAY COMPANY,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE
COMMERCE COMMISSION, AND RANDOLPH BRYANT,
UNITED STATES DISTRICT ATTORNEY FOR THE EAST-
ERN DISTRICT OF TEXAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF TEXAS.

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[fol. 1]

IN THE

SUPREME COURT OF THE UNITED STATES

No. —

DAYTON-GOOSE CREEK RAILWAY COMPANY, Appellant,

vs.

THE UNITED STATES OF AMERICA et al., Appellees

Appeal from United States District Court, Eastern District of Texas

CAPTION

Be it remembered, That at a Special Term of the District Court of the United States, for the Eastern District of Texas, held in and for the Fifth Circuit, at the Court Room, in the City of New Orleans, Louisiana, on the 16th day of February, A. D., 1923.

Present, the Honorable R. W. Walker and the Honorable Alex C. King, United States Circuit Judges for the Fifth Circuit, and the Honorable Rufus E. Foster, United States District Judge, designated to hold sessions of the United States District Court in and for the Eastern District of Texas, presiding, the following proceedings were had, and the following cause came on for trial, and was tried, to-wit:

Style of Cause

No. 262. In Equity

DAYTON-GOOSE CREEK RAILWAY COMPANY, Complainant,

vs.

THE UNITED STATES OF AMERICA et al., Defendants

[fol. 2] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF TEXAS, AT BEAUMONT

In Equity. No. 262

[Title omitted]

ORIGINAL PETITION OF DAYTON-GOOSE CREEK RAILWAY COMPANY
Filed Dec. 6, 1922

To the Honorable the Judges of said Court:

The petition of Dayton-Goose Creek Railway Company, herein-after called Complainant, exhibited against The United States of America, hereinafter called defendant, and against the Interstate

Commerce Commission, hereinafter called Commission, and against Randolph Bryant, United States District Attorney in and for the Eastern District of the State of Texas, respectfully shows:

One

That Complainant is a citizen of the United States of America and is a corporation created and existing under the laws of the State of Texas, with its principal office and principal operating office in the town of Dayton, Liberty County, State of Texas, in the Eastern District of said State, and within the Beaumont Division of said Eastern District, and is a citizen and an inhabitant of the State of Texas and of the Beaumont Division of said District; that Complainant is now and has been since a date long prior to the 29th day of February, A. D. 1920, a common carrier by railroad engaged in the transportation of freight and passengers, for hire, in intrastate, interstate and foreign commerce, and as such is now and was at all times herein mentioned subject to the Act of Congress entitled "An Act to regulate commerce, and for other purposes," approved February 4, 1887, and Acts amendatory thereof and supplementary thereto, also subject to the lawful provisions of the Transportation Act, 1920, approved February 29, 1920, and to all other lawful acts of Congress regulating railroads engaged in interstate and foreign commerce.

The United States of America have by Act of Congress consented to be sued by citizens of the United States in cases of this class, and have provided by law the method of service in such cases.

The Interstate Commerce Commission was created by and has been duly organized in pursuance of the Act of Congress entitled "An Act to regulate commerce, and for other purposes," approved February 4, 1887, and Acts amendatory thereof and supplementary thereto, and has, holds, and exercises all of the lawful powers, duties, rights and privileges conferred upon said body in and by the terms of said Act, and by acts amendatory thereof and supplementary thereto; that Charles C. McChord is Chairman of said Commission, and Geo. B. McGinty is Secretary thereof, and each of them resides in the District of Columbia, and is an inhabitant of said District; that under the law said Commission is charged with the enforcement of all laws regulating and controlling common carriers by railroad engaged in interstate and foreign commerce and doing business in the United States; and that such Commission, acting under the said Acts of Congress and under the authority of the United States and under the laws of the United States, has the power to sue and to be sued, and that service of process upon the Secretary of said Commission or upon the Chairman of said Commission is sufficient service to require said Commission to appear, plead, and answer in all suits against it, at law or [fol. 4] in equity, in the courts of the United States, which are granted jurisdiction by law over suits against said Commission.

That Randolph Bryant is the duly and legally appointed, qualified and acting District Attorney for the United States, in and

for the Eastern District of Texas, and as such is charged with the prosecution of all offenses against the laws of the United States subject to prosecution within said district, and is charged with the duty of instituting and maintaining all prosecutions in the name of the United States for recovery of penalties against railroad companies for violations of laws for which penalties are fixed, and is also charged with the duty of acting for and on behalf of said Interstate Commerce Commission, as well as for and on behalf of the United States, in all such prosecutions and efforts at recoveries, and is also charged with the duty of conducting all such prosecutions at the instance of the Attorney General of the United States, or of the Department of Justice of the United States.

Two

That Complainant at all times herein mentioned owned and operated and now owns and operates, a line of standard gauge railroad extending from the said town of Dayton, in Liberty County, Texas, to Goose Creek and Baytown, in the County of Harris, State of Texas, with a trackage right over the line of road of the Trinity Valley & Northern Railway Company from said town of Dayton to a point north and east thereof, at a connection with the line of road of The Beaumont, Sour Lake & Western Railway Company. That at all times herein mentioned it has connected and interchanged traffic at the said town of Dayton with Texas & New Orleans Railroad Company, a common carrier by railroad constituting a part of [fol. 5] the Southern Pacific System of railroads, extending from the Pacific Coast to the City of New Orleans, State of Louisiana; and by means of the said Trinity Valley & Northern Railway Company, as an intermediate carrier, Complainant has at all times hereinafter mentioned interchanged and now interchanges traffic with the said The Beaumont, Sour Lake & Western Railway Company, which constitutes a part of a system of railroads extending from the City of Brownsville, Cameron County, Texas, on the Mexican border, to the City of New Orleans, State of Louisiana, known and operating as Gulf Coast Lines.

Three

That heretofore, to wit, on or about the 16th day of January, A. D. 1922, the Commission, on its own motion and without complaint, made and entered a certain order "In the Matter of Recovery and Payment of Excess Railway Operating Income under the Provisions of Section 15a of the Interstate Commerce Act, as amended," a copy of which order marked Exhibit "A" is hereto attached and hereby referred to and made a part hereof for all purposes, as fully as though herein set forth at length, said order being hereafter referred to as the 1920 order.

Four

That on or about the 16th day of March, A. D. 1922, the Commission, on its own motion and without complaint, made and en-

tered a certain other order "In the Matter of the Recovery and Payment of Excess Railway Operating Income under the Provisions of Section 15a of the Interstate Commerce Act for the year ended December 31, 1921," a copy of which last mentioned order, marked Exhibit "B," is hereto attached and hereby referred to and made a part hereof for all purposes as fully as though set forth herein at length, said order being hereafter referred to as the 1921 order.

[fol. 6]

Five

That each and both of said orders were entered and made by the Commission for the purpose and with the design of enforcing those provisions of Section 15a of the Interstate Commerce Act, as amended, relating to the recovery by and payment to the Commission of so-called excess railway operating income and the establishment and maintenance of the reserve fund mentioned in said Section 15a, which section was added to the Interstate Commerce Act by an Act of Congress approved February 20, 1920, and known as the Transportation Act, 1920.

Six

That by the terms of the said 1920 order this complainant, was directed on or before the first day of February, 1922, to report to the Secretary of the Commission among other things, the following matters:

(a) The amount by which its net railway operating income for the period commencing March 1, 1920, and ending December 31, 1920, was in excess of that percentage of the value of railway property held for and used by it in the service of transportation, established by the rules prescribed in said 1920 order, with explanation and details of the manner in which such so-called excess income was computed, or, in the event there was no such so-called excess railway operating income, to report that fact with corresponding calculations and details in support of the return.

(b) A statement of the title of the fund account in which one-half of any reported so-called excess income was placed; when such reserve fund was established; the amount placed in that fund, and how the assets in that fund are represented or held.

(c) The amount of the remaining one-half of the so-called excess income, computed according to said rules, previously paid to the Commission; and when and how so paid, if at all.

[fol. 7] (d) The value of the railway property of complainant, with a statement in detail of the manner in which such value was arrived at.

And by the terms of said 1920 order this complainant was further directed to pay to the Commission the one-half of such so-called excess income not paid into the reserve fund above referred to, by remittance to or draft in favor of the Commission, to be transmitted

to the Secretary of the Commission, concurrently with the filing of said report, unless previously paid; and a definite date for payment was in said order duly fixed and a definite demand for payment duly made upon complainant.

By the terms of the said 1920 order this complainant was directed by the Commission to report, on or before May 1, 1922, for the period commencing January 1, 1921, and ending December 31, 1921, substantially the same information with respect to its receipts, expenses, earnings, income, and property, and investment of funds, as was required by the 1920 order for the last ten months of the year 1920, as hereinabove set out; and by the terms of said 1921 order complainant was also directed in like manner to pay to the Commission one-half of complainant's so-called excess net income, and to place the remainder thereof in said fund, and a definite date for payment was in said order duly fixed, and a definite demand for payment duly made upon complainant.

For a more particular statement of the requirements and provisions of said orders, and each of the same, reference is here made to the copies thereof attached hereto, which are made parts of this petition and bill of complaint.

That the dates for the filing of the reports and payment of the sums of money required by the several orders above referred to, were from time to time extended by the Commission, but have since expired and the demands of the Commission upon complainant and the amounts thereof have become and now are definite and fixed.

[fol. 8]

Seven

That in pursuance of said 1920 order complainant duly filed with the Commission a return or schedule, a copy of which, marked Exhibit "C," is hereto attached and hereby referred to and made a part hereof for all purposes, as fully as though herein set forth at length, said return or schedule being hereafter referred to as the 1920 report.

Eight

And in pursuance of said 1921 order complainant duly filed with the Commission a return or schedule, a copy of which, marked Exhibit "D," is hereto attached and hereby referred to and made a part hereof for all purposes, as fully as though herein set forth at length, said return or schedule being hereafter referred to as the 1921 report.

Nine

That said reports truly reflected the receipts, expenses, earnings, income, assets, properties, property costs and book values, according to the rules and requirements of the Commission, but neither of said values represents the true value of complainant's property, which is devoted to and used for common carrier purposes, and complainant especially denies that either such value is the true value of its said property, and avers that in making its reports it used such values

solely because it understood the rules of the Commission to compel complainant to use and set up such values from its books and records, and complainant duly reported to the Commission all the facts called for in each of said respective orders, in accordance with the rules prescribed in said orders, and in accordance with the books, records and accounts of complainant for the respective periods covered by said reports, as of the dates of said respective reports and as kept in [fol. 9] accordance with the accounting rules promulgated by said Commission. But said reports do not, and will not in the future, truly reflect the actual receipts, expenses and income properly and equitable attributable to said respective periods of time, as is more fully set forth below.

Ten

That upon consideration of the 1920 report the Commission has demanded that complainant pay to the Commission the sum of Ten Thousand, Eight Hundred Thirty Three and 12/100 Dollars (\$10,833.12), that being one-half of the so-called excess income shown by said report; and upon consideration of the 1921 report the Commission has demanded that complainant pay to the Commission the further sum of Sixteen Thousand, Eight Hundred Eighty Three and 49/100 Dollars (\$16,883.49), that being one-half of the so-called excess income shown by the 1921 report; said demands aggregating the sum of Twenty Seven Thousand Seven Hundred Sixteen and 61/100 Dollars (\$27,716.61); and on the basis of said respective reports said Commission has also demanded, and the orders above described and Section 15a of the Interstate Commerce Act purport to require, that complainant set aside in a reserve fund, to be established by it for the purposes of said Section, like amounts aggregating an additional sum of Twenty Seven Thousand, Seven Hundred Sixteen and 61/100 Dollars (\$27,716.61). A copy of the last demand made by the Commission, which was received by complainant on or about October 31, 1922, is attached hereto and marked Exhibit "E" and made a part hereof for all purposes, as fully as if herein set forth.

[fol. 10] Complainant says that the defendant and the Commission are in possession of the originals, or exact copies, of each and all of the exhibits hereinabove referred to, and Complainant here and now notifies the defendants, and each of them, to produce upon the hearing and upon the final trial of this cause the original reports made by the Complainant to the Commission, failing to do which, Complainant will offer secondary evidence of the contents of such reports.

Eleven

That said several orders and demands of the Commission and said requirements of Section 15a of the Interstate Commerce Act, and particularly said orders of the Commission for the payment of money and the creation and maintenance of said so-called reserve fund, and said demands for the payment of money and for the establishment

and maintenance of said fund, are and ever have been wholly void as to Complainant and beyond the power and authority of the Congress to enact and beyond the power of the Commission to direct, require or enforce, because in contravention of the Constitution of the United States in the respects more fully set forth below.

Twelve

That the provisions of Section 15a of the Interstate Commerce Act relative to the payment of so-called excess income to the Commission, and relative to the establishment and maintenance of the so-called reserve fund therein referred to, and the construction placed thereon by the defendants herein, and the administrative acts of the Commission in pursuance thereof, and the said orders and demands of the Commission in respect thereto, are each and all, as to Complainant, null and void and wholly invalid, for that the same, and each of them, are in contravention of the Fifth Amendment [fol. 11] to the Constitution of the United States, repugnant to both the spirit and letter of said amendment, and in direct conflict therewith, which said amendment provides that no person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the law, nor be subjected to arbitrary and unequal laws, and which said amendment prohibits the taking of private property for public use without just compensation; as will more fully appear from the specific objections, facts, conditions and reasons hereinbelow more fully set forth, to wit:

(a) The property of Complainant devoted to common carrier uses and purposes and owned by Complainant, while devoted to a public use, is nevertheless the private property of the Complainant, and remains its property notwithstanding such use; and the income, revenues, receipts, moneys, and profits arising from the use of said property as a common carrier, or otherwise, becomes, is and remains the private property of Complainant, and cannot, consistently with said amendment to the Constitution, be taken from the Complainant without due process of law, and cannot be taken by mere arbitrary enactment by the Congress of the United States; and to require Complainant to pay to the Commission, for the use of the United States, and to pay into said reserve fund, any part of the income or revenues arising from the use of said property, for the purposes set forth in said Section 15a of the Act to Regulate Commerce, or for any other purpose, is in violation of said Fifth Amendment to the Constitution of the United States.

(b) In like manner, Complainant, being the owner of said property and being entitled to the revenues, income, receipts, and profits therefrom, and being the owner of said revenues, income, receipts, and profits, is entitled to all the rights, privileges, and immunities incident to such ownership, including the liberty of ownership, [fol. 12] which is the right to use and dispose of said property by Complainant, according to its own judgment and without interference from any other source whatsoever, otherwise Complainant

would be denied the liberty of contract, the liberty of dominion over its property, the liberty of retaining and possessing its own, and the liberty of disposing of its own in such reasonable manner as it may see fit; and the taking of any part of Complainant's income, or compelling the investment thereof in any particular manner or for any particular purpose or restraining the expenditure thereof except for certain limited and restricted purposes, deprives Complainant of its liberty and property without due process of law, and is in violation of said amendment to the Constitution of the United States.

(c) The property of Complainant, which is devoted to common carrier purposes, being its private property, and the revenues, income, receipts, and profits therefrom being Complainant's private property, notwithstanding said property may be devoted to common carrier uses, continues Complainant's private property, subject to Complainant's complete dominion over it; and for the Commission or the United States to take said property, or any part thereof, for public uses, or to compel Complainant to invest the same, or any part thereof, in any particular manner or for any particular purpose, or to limit or restrict the expenditure or use thereof as provided by the reserve fund provisions of said Section 15a and of said orders, denies to Complainant the equal protection of the law and subjects it to unequal, arbitrary and discriminatory laws, because said requirements are not applied to nor enforced against the income of other persons or corporations or of other railroad companies, and is therefore in violation of said Fifth Amendment to the Constitution of the United States.

[fol. 13] (d) In like manner, Complainant is the owner of said property, and although devoted to public use, such property is still the private property of Complainant, within the meaning of the Fifth Amendment to the Constitution of the United States, and the revenues, receipts, income and profits, of every kind and character whatsoever, arising from the use of said property and accruing therefrom immediately becomes, is and remains the private property of Complainant, and no part thereof can be taken from Complainant by enactment of the Congress of the United States, by action of the Commission, or by action of the United States, for public use, without just compensation, because such taking is expressly prohibited by the Fifth Amendment to the Constitution of the United States; and Complainant avers that the involuntary payment by it of said money to the Commission or to the United States, as required by the terms of said Section 15a and demanded in the aforesaid orders, or the involuntary investment by Complainant of any part of said funds as required by the terms of said Section 15a and directed in said orders, would each and both be a taking of Complainant's property for public use without just compensation, and in truth and in fact without any compensation of any character whatsoever, and without due process of law.

(e) That all of the revenue, income and profits shown by Complainant in the aforesaid reports to the Commission, being made in

the manner and form required by the Commission, did not arise nor accrue from the collection of charges for transportation of persons or property, nor from services incident thereto; but a substantial portion of such net income arose and accrued to the Complainant from sources other than the transportation of persons and property and services incident thereto, and from other sources than the collection of rates, fares and charges and services incident thereto fixed [fol. 14] by the Commission; and such income arising from non-carrier sources is not charged in any manner with any public use nor is it in any manner affected with a public interest; and neither the Commission nor the law under which the Commission is acting makes any provision for the purpose of determining so-called excess income for a separation of the revenues derived from transportation or carrier services and charges and receipts therefor and incident thereto from those which accrued entirely independently of any carrier or transportation service; and if the Congress had the power to take private property for public uses which accrued to Complainant from carrier or transportation services or sources, it could not have and has not the power to take from Complainant any part of such rents, revenues, income, and profits which accrued to it from rentals, leases, trackage rights, interest or any source wholly disconnected and separated from its transportation or carrier services and the charges and receipts therefor. There being no means of separation provided by law or attempted by the Commission either in said orders or otherwise, the taking of Complainant's property is in direct violation of said Fifth Amendment to the Constitution of the United States, and would be without due process of law, and would, in contravention of said amendment, subject it to unequal, arbitrary and discriminatory laws.

(f) The line of railroad of Complainant, together with its equipment, facilities, appurtenances, privileges, franchises, and immunities, was owned and operated by Complainant, and had been continuously owned and operated for a long period of time prior to the 29th day of February, 1920, the date of the passage and approval of the Act of Congress of which said Section 15a is a part. At said [fol. 15] date, and long prior thereto, Complainant's properties were vested and fixed in it, and Complainant under the Constitution and laws of the United States held, owned and possessed the constitutional right to collect, receive, and retain, and to exercise complete, untrammelled and unrestricted dominion and control over all revenues, earnings, income, receipts, and profits produced by said properties under just and reasonable rates, charges and practices. All income and savings resulting from efficient and economical management, favorable location, and density of traffic accruing to Complainant under such rates, charges and practices, were, became, and remained the private property of Complainant, subject to its uses and reasonable disposition in such manner as Complainant should elect; but if the aforesaid terms and provisions of said Section 15a and said orders and demands of the Commission are enforced against

Complainant, and the revenues, income and profits earned by Complainant are taken from Complainant by the Commission for public or other use, such action would deprive Complainant of its liberty and of its private property without due process of law, and will deny to Complainant the equal protection of the law, and will take the private property of Complainant for public or other use without just compensation, in violation of the Constitution of the United States, and in violation of the fixed and vested rights, privileges, franchises, and immunities which Complainant had, held and possessed under the Constitution of the United States at the time of the passage of said law, and of which it cannot be divested in violation of said Constitution.

Thirteen

That all rates, fares, and charges collected or participated in and ultimately accruing to Complainant in and for each of the respective periods covered by the 1920 and 1921 reports, as between Com-[fol. 16] plainant and defendants herein, are, and of necessity must be held and deemed to be just and reasonable and non-excessive rates, fares and charges, and that defendants, and each of them, are precluded and estopped from denying or contesting the reasonableness thereof; that said rates, fares and charges, each and every, were made fixed and determined by orders of the Railroad Commission of the State of Texas and by orders of the Interstate Commerce Commission, and Complainant was bound to obey and observe, protect and enforce the same; that neither the Texas Railroad Commission nor the Interstate Commerce Commission has or had the power to prescribe other than reasonable rates, fares and charges for services performed by Complainant or any other railroad company in or incident to the transportation of persons and property, and Complainant says that neither the Commission nor the Congress of the United States has power to compel Complainant to refund to the public by paying to the Commission for public or private use, or to place in said reserve fund, subject to use only for certain limited and restricted purposes, any part of the rates, fares and charges collected by it; and every effort on the part of the Congress and the Commission, to compel the payment to the Commission of and part of the so-called excess earnings of Complainant for each and both of the aforesaid periods, is in violation of the Constitution of the United States, and more especially of the Fifth Amendment of said Constitution, is unlawful and unenforceable, for the reasons that:

(a) The Commission, acting upon the authority and direction of Congress as set forth in the Transportation Act, 1920, and in pursuance of the duties imposed upon it in that respect, in a proceeding known upon the docket of the Commission as Ex Parte 74, undertook to and did divide the railroads of the United States into groups, [fol. 17] and fixed such rates, fares, tolls, and charges for each group as in its judgment and opinion would produce the fair return upon the value of the property devoted to public uses for common carrier purposes, as provided for in said Act; and Complainant avers that

the rates so fixed by said Commission for the group comprising the territory in which Complainant is located proved to be wholly and utterly inadequate, and too low to afford, produce or raise the net revenue upon property devoted to carrier purposes as contemplated and provided for in the aforesaid Act; and if perchance Complainant was so favorably situated that by virtue of economy of operation or density of traffic or other causes it earned a net income upon the value of its property in excess of the amount prescribed by said Act, the same cannot nevertheless be taken from it under the terms of said Act, for the reason that all of the properties in the group of which complainant is a member, taken as a whole and averaged, earned far less than the net income authorized and allowed by said Act. Substantially all the traffic transported by Complainant during said respective periods passed over two or more railroads in the group of which Complainant was a member, and the traffic was subject to agreed divisions between Complainant and connecting carriers; and if by virtue of its favorable situation, the density of traffic, and the large amount of traffic originated by it on its line of road and exclusive to it, it was enabled to obtain such divisions from carriers as increased its earnings, it is nevertheless true that the carriers in the group of which Complainant is a member earned far less than the amount authorized and permitted by said Act, and therefore Com-[fol. 18] plainant cannot be segregated and singled out and have taken from it a proportion of said earnings which it was enabled to obtain by virtue of its favorable location and traffic control, and which substantially all arose from fair and just divisions with other lines less favorably situated as to density of traffic originated per mile of road operated by such other lines.

(b) Notwithstanding that the reports aforesaid show for the periods aforesaid certain net earnings in the manner in which the reports reflect the truth as of the respective dates of said reports, in so far as correct answers to the questionnaire of the Commission are concerned, yet, nevertheless, said reports do not reflect the true facts as to the property values devoted to carrier purposes, nor as to the total final net earnings of either period, but are subject to pending claims and to all such claims as may hereafter be presented against Complainant for which Complainant may be legally liable, including claims for alleged overcharges collected during each of said periods, for loss and damage to property, for injury to and death of persons, and for claims by shippers with respect to the reasonableness, justness or legality of the rates, fares and charges collected by or participated in during such respective periods by Complainant.

While the general level rates, as between Complainant and defendants, must be conclusively presumed to be reasonable, yet specific rates, as between Complainant and shippers paying such rates, are open to litigation and subject to claims that each and every rate is unreasonable. Such attacks made by shippers upon specific rates are constantly being prosecuted in the courts and before the Commission, and Complainant has reason to believe, and does believe and so charges, that some such complaints will be prosecuted against it on

[fol. 19] account of charges made and collected or participated in during the respective periods covered by said reports, and recoveries had by shippers therefor and expenses will be incurred in the defense of such claims, whether successful or not, and court costs and attorneys' fees will have to be paid by Complainant, and no refund can be made to it therefor under the law.

Complainant has no means of knowing what the aggregate amount of claims for overcharges, loss, and damage to property, injuries to or death of persons, and unreasonable rates, may amount to, and no means of estimating same, and does not and cannot know that when all of such claims are finally presented and determined they will not in the aggregate so reduce the net income of Complainant as shown in the aforesaid reports for both of said periods as that the so-called net income will be below what is authorized and provided for in said Section 15a of the Interstate Commerce Act.

All of such claims when established, for each and both of said periods, will be fixed liabilities of Complainant, and payment thereof by Complainant may be compelled and enforced by the holders and owners of such claims. Neither said Section 15a of the Interstate Commerce Act, nor the rules and regulations of the Commission in relation thereto, make any provision of any character through which any refund may be obtained from the Commission by Complainant on account of being compelled to pay any such claims for either period, and if it were within the constitutional power of Congress and the Commission to take the private property of Complainant in the manner provided for in said Act, the amount which the Commission might lawfully take under the terms of said Act cannot now be determined, and no amount could lawfully be taken until the exact amount could be determined or until Congress and the Commission have made definite and adequate provisions for reparation to Complainant sufficient to indemnify and protect Complainant against the payment of any and each and all and every of such claims for which Complainant's liability may subsequently be established, none of which has been done by Congress nor by the Commission.

Complainant avers that it cannot state or estimate the exact amount that it may be compelled to pay hereafter on claims for which it may be legally liable, accruing and maturing during the period covered by said reports, but upon information and belief alleges that such claims have accrued, that it is legally obligated to pay the same or at least some of them and will hereafter be compelled to pay the same, and that the aggregate of such claims will be a substantial sum of money, and that no provision is made by which Complainant may withdraw from the specially invested fund any part thereof, or be repaid by the Commission and the defendant herein, or either of them, any sum of money so paid out by Complainant, or any part of such sum so paid out by it.

It is manifest, therefore, that whenever any claims are established as liabilities against Complainant, accruing during and justly chargeable against the periods covered by said reports and are paid by Com-

plainant, Complainant's private property will be taken without due process of law and without compensation, as the payment of any such claims necessarily will reduce Complainant's net income for such period below the amount shown on the report therefor and below the amount which the Congress of the United States declared by law to be reasonable for the periods stated.

(c) Complainant alleges that the defendants are estopped to deny, as between Complainant and defendants, the reasonableness of the rates, tolls, charges, and fares, and charges incident thereto, [fol. 21] collected or participated in by Complainant during the periods covered by the said reports, and that it is manifest from the law and the orders of the Commission that the defendants do not seek to take said sums of money from Complainant upon the theory that the rates, tolls, fares and charges collected or participated in by Complainant were unreasonable or unjust or excessive in any respect whatsoever. If it be true that said rates, tolls, fares, and charges for each and both of said periods were and are just and reasonable, then it is beyond the power of the defendants and of the Congress to take from Complainant the fruits of its service earned upon just and reasonable rates, tolls, fares and charges, and any such taking would be in violation of the Constitution, as hereinbefore more specifically set forth. If any specific rate, toll, fare, or charge, or any or all of the rates, tolls, fares and charges in effect during the periods covered by said reports were in fact unjust, unreasonable or excessive, then the persons paying such unjust, unreasonable or excessive rates, tolls, fares, or charges are, under the laws of the United States, entitled to reparation for and on account of such unjust, unreasonable or excessive rates, tolls, fares, or charges, and may lawfully compel Complainant to pay to such persons so paying such excess the amount of such excess received by Complainant, and through this process it is manifest that Complainant would be subjected to a double recovery and repayment and reparation on account of all rates, tolls, fares and charges which it collected or in which it participated that proved to be unjust, unreasonable, or excessive; and no provision is made in law or in the rules and regulations [fol. 22] of the Commission, by which indemnity, protection, or reparation can be afforded Complainant on account of such double recovery.

(d) Complainant avers that a large and substantial proportion of the income earned or received by it and reflected in each and both of said reports as made to the Commission arose and accrued solely for and on account of rates, tolls, fares, and charges for the transportation of passengers and freight in intrastate commerce, conducted wholly within the State of Texas; that it is not within the power of Congress to take from Complainant the earnings, or any part of the earnings, accruing to Complainant from purely intrastate commerce; that to do so would be in violation of the Tenth Amendment of the Constitution of the United States, and any law

seeking so to do would be wholly void; that the defendant herein and the Commission cannot complain, nor can they, or either of them, nor can interstate and foreign commerce and persons engaged therein, nor either or any of them, be in any manner injuriously affected or in the slightest way prejudiced by large earnings on the part of Complainant accruing to it from intrastate commerce.

That if the receipts and income of Complainant from the handling and movement of intrastate traffic be unduly low, or amount to less than a fair return upon the value of the property devoted to that public service, manifestly the Congress and the Commission are prohibited by the Fifth and Tenth Amendments to the Constitution of the United States from further reducing those receipts by requiring a part thereof to be paid to the Commission and placed in the re-[fol. 23] serve fund contemplated by said Section 15a. And, on the other hand, if the receipts and income of Complainant resulting or accruing from the handling and movement of intrastate traffic are reasonably or sufficiently or even unduly high, then, and in every such case such receipts and income have and bear no such relationship to interstate or foreign commerce as will justify or create occasion for any interference with or regulation of or capture or recapture of the same, or any part thereof, by the Congress or the Commission under the power to regulate commerce with foreign nations and among the several states.

That, as the State is forbidden to complain of earnings in interstate commerce, or to place burdens thereon, or to take the receipts and avails therefrom, so also the law is that the fact that a carrier is engaged in both State and interstate commerce does not authorize, permit, or justify the Congress or the Commission in complaining of or taking or reducing excess earnings arising from the conduct of intrastate commerce, nor authorize the imposition by Congress of unjust and unreasonable burdens upon intrastate commerce, nor authorize nor permit the Congress or the Commission or the United States to take from the Complainant the earnings, or any part thereof, which accrued to Complainant on account of earnings by it in purely intrastate commerce. Neither the law nor the Commission has made or attempted to make any rule, regulation, or provision by which excessive earnings, if any, in intrastate commerce may be separated or segregated from the earnings of the carrier in interstate and foreign commerce, and no such effort at separation has been [fol. 24] made; and the Commission has demanded that Complainant shall pay to it not only all the so-called excess earnings earned by Complainant in interstate and foreign commerce, over which Congress has the power of control and regulation, but has also demanded that Complainant shall pay to the Commission all of its so-called excess earnings, including those accruing to Complainant for its services in purely intrastate commerce, the right to control which is expressly reserved, by the Tenth Amendment to the Constitution of the United States, to the State of Texas and to the people of the State, and is not subject to the control, regulation, or dominion of the Congress of the United States nor of the Commission.

Fourteen.

That complainant is informed and believes and charges that under the Act to Regulate Commerce, and amendments thereof and supplements thereto, and under the so-called Elkins Act and amendments thereof, defendants contend that Complainant, and each of its officers and directors, is subject to a fine in a sum not exceeding five thousand dollars (\$5,000.00), for failure to comply with the demands of the Commission to pay to it and to pay into said reserve fund the said several sums of money hereinbefore set out. Complainant alleges that it is informed and believes and so avers, that the defendants contend that each of its officers and directors is subject to be prosecuted by the defendants herein, and particularly by the defendant Randolph Bryant, acting in his official capacity as United States District Attorney as aforesaid, unless said respective orders of the Commission are complied with and unless said respective [fol. 25] five sums of money, aggregating the sum of Fifty-five Thousand, Four Hundred Thirty-three and 22/100 dollars (\$55,433.22) are paid to the Commission and into the so-called reserve fund, as required by said Section 15a, and demanded by said Commission; that the construction of said laws by the defendants is a constant and continuing menace to Complainant, for the reason that its officers and directors, other than its President, have small interests in the properties of the Complainant and cannot afford to take the risk of being prosecuted for violation of the laws of the country and being subjected to fines and humiliation on account thereof, nor can Complainant afford to ask them to take such risk in order to continue in its service, and upon information and belief Complainant avers that it is in constant, continuing and imminent danger of losing the service of its officers and directors, as they would probably resign if any such prosecution should be instituted, or for their own protection they might compel Complainant to pay said sums of money, which in the judgment of Complainant it does not owe and should not be compelled to pay. If such officers and directors should resign, Complainant could not procure others to take their places without giving them full and complete indemnity against financial liability, and as it cannot give indemnity to the present officers and directors, nor to any future officer or director, against the humiliation of being prosecuted for crime and against the annoyance and inconvenience of being haled into court to answer charges for violation of the laws of the country, Complainant is confronted with the constant menace of the resignation of its officers and directors, the inability to obtain others, and the consequent inability to perform its functions and discharge its duties as a common carrier, for failure to do which it would be subject to very severe and extreme penalties under the laws of the State of Texas and under the laws of the United States. [fol. 26] That prosecutions against said officers and against Complainant would practically destroy Complainant's ability to conduct its business and discharge its duties. If Complainant should pay said sums of money so demanded by the Commission to the Commission, and set aside said special fund as required in the orders of

the Commission, in order to avoid prosecutions and to enable it to continue to conduct its business, no provision is made in the Interstate Commerce Act or in the amendments thereof or supplements thereto, or in any other law of the United States, through, under, or by which such money could ever be recovered, though wrongfully paid, as the United States has never consented by law to be sued in any court for the recovery of any such sum so paid; and if Complainant be wrongfully advised in this respect, and if there be a method by which the courts could determine the liability in this respect and compel restoration to Complainant of any money paid by it to the Commission upon unlawful demand therefor, yet nevertheless the expense incident to a suit for that purpose would be very large, as such suit would have to be conducted in the District of Columbia, which is some twelve hundred miles from the situs of Complainant's property and its conduct of its business, and even if it should recover the sums of money so paid by it, it could not recover such expenses and could not recover the interest on said money which would remain in the hands of the Commission or in the hands of the Government for many years, pending a determination of the issues here involved.

[fol. 27] Complainant further alleges that if the validity of said orders and demands of the Commission and of said provisions of Section 15a of the Interstate Commerce Act be not challenged and tested in a proceeding of this character, the Commission will sue Complainant to require the enforcement of said orders and demands and for the recovery of said sums of money and for fines and penalties; that in any such suit there will necessarily be involved the issue of the value of Complainant's property devoted to the service of transportation and to common carrier purposes; that the proper solution of that issue will depend upon many facts, will involve many complexities, and the cost of making preparation for and the trial upon that issue, necessitating the employment of clerks, auditors, engineers, and other laborers and specialists, will be extremely burdensome; all of which may be avoided by the present form of action.

Complainant avers upon information and belief, that unless said several sums of money so demanded by said Commission are promptly paid, and said orders otherwise complied with, said Commission will undertake to prosecute Complainant, its officers and directors, for fines and penalties for failure to so pay, and that the defendant, Randolph Bryant, United States District Attorney, will be called upon by said Commission to institute prosecutions on account of the disobedience of said orders, and that he will in his capacity, as such United States District Attorney for the Eastern District of Texas, proceed to institute and vigorously push such prosecutions for the recovery of such fines and penalties.

All of the matters and things above alleged and charged would cause to Complainant irreparable injury, which could not be recovered [fol. 28] in damages, nor could it otherwise be made whole, and consequently Complainant is wholly without remedy at law for any relief against the wrongs, ills, trespasses and injuries herein com-

plained of, and, unless restrained by your honor's most gracious writ of injunction, will be wholly remediless against the same.

Complainant further avers that no damage or injury can or will result to the defendants if said prosecutions are enjoined and prohibited and the payment of said money is restrained, and Complainant here now offers to enter into bond, with good and solvent sureties, in amount and form sufficient and satisfactory to the Court, to guarantee the payment of all sums of money and the performance of every obligation on the part of Complainant which it may finally be adjudged to pay or to perform, and for all damages for such failure, and all interest on any sums of money which it may lawfully and ultimately be adjudged to pay.

For as much as your Complainant is wholly without any adequate remedy at law it avers that it will be wholly remediless unless protected by this Court's restraining order and writ of injunction.

Premises considered, Complainant prays:

(a) That a proper court be assembled, to which this petition and application may be presented and submitted;

(b) That on due notice to the defendants and to the Attorney General of the United States, and after hearing of this petition and application, this Court may issue its writ or process, temporarily staying and suspending the said orders of the Commission and each of them, so far as they relate to the payment of money to the Commission and into said reserve fund, and enjoining defendants and each of them from instituting or prosecuting any civil or criminal [fol. 29] suit or suits against Complainant or any of its officers or directors, or either of them, jointly or severally, until Complainant can present to the court, on a day to be fixed in said order, this its petition and application for an interlocutory injunction against the enforcement of said orders in the respects aforesaid;

(c) That after hearing, to be likewise held after due notice to the defendants and the Attorney General, there may issue out and under the seal of this Honorable Court a writ of temporary or interlocutory injunction, directed against the defendants, enjoining, restraining and suspending until the entry of the final decree the enforcement of said orders, and each of them, and the prosecution of Complainant or its officers or directors, jointly or severally, in the respects mentioned in this prayer;

(d) That on final hearing this Court enter its order perpetually suspending vacating, annulling and avoiding said orders of the Commission, and each of the same, as to Complainant, and perpetually enjoining and restraining the enforcement of said orders, and each of them, in all respects, and each and every attempt thereat; and,

(e) For all such other and further relief, at law or in equity, special or general, as Complainant, by virtue of the premises may be entitled to receive; and as in duty bound Complainant will ever pray.

(f) Complainant further prays for service of subpoena and process upon the Commission, which service may be made on Geo. B. McGinty, Secretary of said Commission; and for service of subpoena upon the United States, which service may be made by filing a copy of this petition in the office of the Secretary of the Interstate Commerce Commission and with the Attorney General of the United [fol. 30] States in the Department of Justice; and service of subpoena upon Randolph Bryant, United States District Attorney for the Eastern District of Texas, which service may be made upon him in person, in Grayson County, Texas, the county in which he resides, or in Jefferson County, Texas, where he is temporarily sojourning and may be found.

Dayton-Goose Creek Railway Company. R. S. Sterling, President. (Seal.) Attest: Lee Bryan (Lee Bryan), Asst. Secretary. (Seal.) Jno. C. Townes, Jr. (Jno. C. Townes, Jr.), Solicitor for Complainant and its General Attorney. Andrews, Streetman, Logue & Mobley (Andrews, Streetman, Logue & Mobley), Special Counsel. (Robert H. Kelley) Robert H. Kelley, (Frank Andrews) Frank Andrews, Of Counsel.

THE STATE OF TEXAS,
County of Harris:

Before the undersigned notary public in and for Harris County, Texas, on this day personally appeared R. S. Sterling, who being by me first duly sworn, upon his oath deposes and says:

That he is President of Dayton-Goose Creek Railway Company, and has continuously been such President since the organization of said company; that he is the chief executive officer in charge of the affairs of said company and familiar with its business and operations; that he has read the foregoing bill of complaint, and the matters and [fol. 31] things therein stated are true as therein stated, except such as may be stated therein upon information and belief, and as to those so stated affiant verily believes the allegations to be true.

R. S. Sterling.

Sworn and subscribed to before me by R. S. Sterling, this the fifth day of December, A. D. 1922, as witness my hand and seal of office. H. Millsapp, Notary Public in and for Harris County, Texas. (Seal.)

[fol. 32]

EXHIBIT "A" TO PETITION

Interstate Commerce Commission
Washington*Order*

At a Session of the Interstate Commerce Commission, Division 4,
Held at Its Office, in Washington, D. C., on the 16th Day of January, A. D., 1922.

In the Matter of the Recovery and Payment of Excess Railway Operating Income under the Provisions of Section 15a of the Interstate Commerce Act.

The Commission having under consideration the provisions of paragraphs (6) and (9) of Section 15a of the Interstate Commerce Act, reading as follows:

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof, shall, within the first four months following the close of the period for which such computation is made be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purpose of this paragraph the value of the railway property and the new railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. [fol. 33] In the case of any carrier which has accepted the provisions of Section 209 of this amendatory act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided for in paragraph (4).

(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of the year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

It is ordered:

(1) That the years or parts of years for which net railway operating income and the return represented by such income upon the aggregate value of railway property held for and used in the service of transportation are to be computed shall be the years or parts of years ending on December 31, respectively. In the case of any carrier which accepted the provisions of Section 209 of the Transportation Act, 1920, the first period for which such computations are to be made shall be September 1, 1920, to December 31, 1920, both inclusive. In the case of carriers which did not accept the provisions of said Section 209 of the Transportation Act, 1920, the first period for which such computations are to be made shall be March 1, 1920, to December 31, 1920, both inclusive.

[fol. 34]* (2) That the excess income for the portions of a year ended December 31, 1920, shall be preliminarily fixed as the income in excess of such proportions of 6 per cent on the value of the railway property held for and used in the service of transportation as the net railway operating income for the months of September to December, both inclusive, or for the months of March to December, both inclusive, as the case may be, in the three years ended June 30, 1917, bears to the total net railway operating income for the same three years.

(3) The aggregate value of the railway property of the reporting carrier or carriers held for and used in the service of transportation shall be based preliminarily, in the case of carriers which made such returns directly or indirectly, upon the amount reported or used by such carrier or carriers as the aggregate value of railway property held for and used by them in the service of transportation in the proceeding entitled "in the matter of the applications of carriers in official, southern and western classification territories for authority to increase rates", Docket No. — Ex Parte 74, with adjustments for—

(a) New lines, extensions and additions, and betterments;

(b) Retirements;

(c) Amounts of property for which permission to retain earnings under paragraph (18) of Section 15a of the Interstate Commerce Act has been granted; and

(d) Other increases or decreases, properly affecting the aggregate value of the railway property of such carriers held for and used in the service of transportation, claimed or reported by the carrier and supported by detailed explanations. The value of such rail- [fol. 35] way property as reported, will be corrected and the actual value will be determined in the manner provided in paragraph (4) of Section 15a of the Interstate Commerce Act, and corresponding adjustments in amounts recoverable by and payable to the Commission will be effected. In the case of those carriers which did not directly or indirectly make returns in connection with Ex Parte 74, the investment in road and equipment as of December 31,

1919, with proper adjustments as hereinabove indicated will be used for preliminary computations, and these preliminary computations will be similarly corrected after the determination of actual values in accordance with paragraph (4) of Section 15a of the Interstate Commerce Act.

(4) The establishment of preliminary bases for prorating the return of 6 per cent, or ascertaining property values to which the rate is applicable, does not preclude any carrier from using such other bases as it considers more equitable and in accord with the facts; such other bases, however, must be fully and properly supported.

It is further ordered, that pursuant to the foregoing rules and regulations for the determination and recovery of the excess income payable under Section 15a of the Interstate Commerce Act each and every carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the provisions of the Interstate Commerce Act, excluding—

- (a) Sleeping car companies and express companies;
- (b) Street or suburban electric railways unless operated as a part of a general steam railroad system of transportation;
- (c) Interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the [fol. 36] general transportation of freight; and
- (d) Any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated and controlled by any State or political sub-division thereof, shall on or before February 1, 1922, report to the Secretary of the Interstate Commerce Commission, Washington, D. C., the following matters:

1. The amount by which its net railway operating income for the period ending December 31, 1920, was in excess of that percentage of the value of railway property held for and used by it in the service of transportation, established by the foregoing rules, with explanation and details of the manner in which such excess income was computed, or, in the event there was no such excess railway operating income, that fact, with corresponding calculations and details in support of the return.

2. In cases where excess net railway operating income is reported, a statement of the title of the fund account in which one-half of such excess was placed, when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held.

3. The amount of the remaining one-half of the excess income as preliminarily computed paid to the Interstate Commerce Commission and when and how such amount was paid. If unpaid the amount should be paid by remittance to or draft in favor of the Interstate

Commerce Commission, transmitted to George B. McGinty, Secretary of the Interstate Commerce Commission, Washington, D. C.

[fol. 37] 4. The value of the railway property of the reporting carrier or carriers with a statement in detail of the manner in which such value is arrived at and a full explanation as to the method in which the values of properties of a group of carriers have been aggregated in cases where property values and income are computed for a system pursuant to the provisions of paragraph (6) of Section 15a of the Interstate Commerce Act. In such cases a full explanation should be given of the reasons why the group of carriers used are treated as under common control, management, and operation.

It is further ordered, that an original report and three copies of the same shall be forwarded to George B. McGinty, Secretary, Interstate Commerce Commission, Washington, D. C. Reports shall be prepared in typewritten or printed form, on paper approximately 8½ by 11 inches, with 1½ inches margin at the left side for binding, except as to exhibits, which may be of any convenient size, but which shall be folded to conform to the size of the report.

It is further ordered that the original reports shall be made under oath signed and filed on behalf of the carrier by its president, a vice-president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

By the Commission, Division 4:

George B. McGinty, Secretary. [Seal.]

[fol. 38]

EXHIBIT "B" TO PETITION

Interstate Commerce Commission

Washington

Order

At a Session of the Interstate Commerce Commission, Division 4.
Held at Its Office, in Washington, D. C., on the 16th Day of
March, A. D. 1922.

In the Matter of the Recovery and Payment of Excess Railway
Operating Income under the Provisions of Section 15a of the Inter-
state Commerce Act for the Year Ended December 31, 1921.

The Commission having under consideration the provisions of paragraph (6) of Section 15a of the Interstate Commerce Act, reading as follows:

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in

the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate [fol. 39] ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of Section 209 of this amendatory act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

It is ordered, that pursuant to the rules and regulations for the determination and recovery of the excess income payable under Section 15a of the Interstate Commerce Act, as defined in our order of January 16, 1922, modified as may be necessary in the case of each respondent for the year ended December 31, 1921, each and every carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the provisions of the Interstate Commerce Act, excluding—

- (a) Sleeping car companies and express companies;
- (b) Street or suburban electric railways unless operated as a part of a general steam railroad system of transportation;
- (c) Interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight; and
- (d) Any belt line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political sub-division thereof, shall on or before May 1, 1922, report to the Secretary of the Interstate Commerce Commission, Washington, D. C., the following matters:

[fol. 40] 1. The amount by which its net railway operating income as defined in paragraph (1) of Section 15a of the Interstate Commerce Act, for the year ended December 31, 1921, was in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, with explanation and details of the manner in which such excess income was computed, or in the event there was no such railway operating income, that fact, with corresponding calculations and details in support of the return.

2. Where it reports excess net railway operating income, the title of the fund account in which one-half of such excess was placed, the date when such reserve fund was established, the amount placed in

that fund, and how the assets in that fund are represented or held, and the amount of the remaining one-half of the excess income, as preliminarily computed, paid to the Interstate Commerce Commission and when and how such amount was paid. If the latter amount is unpaid, it should be paid by remittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, Secretary of the Interstate Commerce Commission, Washington, D. C.

3. The value of such railway property used in earning the income reported for the year ended December 31, 1921, with a statement in detail of the manner in which such value is arrived at and showing the ownership and a general description of such railway property.

4. The foregoing requirements of this order are made subject to the following proviso, that in cases where two or more of said carriers constitute a group under common control and management and operated as a single system, as provided in paragraph (6) above [fol. 41] quoted, the foregoing matters shall be reported for the system as a whole, irrespective of the separate ownership and accounting returns of the various parts of such system, but shall also be reported in so far as practicable for each part of the system, and full explanation shall be made as to the method in which the values of properties of a group of carriers have been aggregated and the reasons why the group of carriers used are treated as under common control, management, and operation.

It is further ordered, that an original report and three copies of the same shall be forwarded to George B. McGinty, Secretary, Interstate Commerce Commission, Washington, D. C. Report shall be prepared in typewritten or printed form, on paper approximately 8½ by 11 inches, with 1½ inches margin at the left side for binding, except as to exhibits, which may be of any convenient size, but which shall be folded to conform to the size of the report.

It is further ordered, that the original reports shall be made under oath, signed and filed on behalf of the carrier by its president, a vice-president, auditor, comptroller, or other executive officers having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

By the Commission, Division 4:

George B. McGinty, Secretary. (Seal.)

[fol. 42]

EXHIBIT "C" TO PETITION

To the Interstate Commerce Commission:

Now comes Dayton-Goose Creek Railway Company, hereinafter called "carrier," and, in compliance with this Commission's order of January 16, 1922, in the matter of the recovery and payment of excess railway operating income under the provisions of Section 15a of the Interstate Commerce Act, files herewith a report of income

31, 1920, AND EXCESS RAILWAY OPERATING INCOME FOR THE INTERSTATE COMMERCE ACT

July 31, 1920	Aug. 31, 1920	Sep. 30, 1920
\$592,981.43	\$587,720.66	\$591,911.08
.005	.005	.005

For Aug., 1920	For Sep., 1920	For Oct., 1920
\$2,964.90715	\$2,938.60330	\$2,959.55540

May, 1920	June, 1920	July, 1920	Aug., 1920
27,261.92	\$37,470.56	\$27,926.99	\$29,452.78
22,829.41	20,882.10	24,796.64	23,603.94
<u>4,432.51</u>	<u>\$16,588.46</u>	<u>\$3,130.35</u>	<u>\$5,848.84</u>
\$299.86	\$299.86	\$299.86	\$299.86
.....	3,273.68	.....	658.13
<u>\$299.86</u>	<u>\$3,573.54</u>	<u>\$299.86</u>	<u>\$957.99</u>
<u>4,132.65</u>	<u>\$13,014.92</u>	<u>\$2,830.49</u>	<u>\$4,890.85</u>
1,819.22	\$2,764.67	\$2,271.25	\$681.41
4.17	4.17	4.17	34.95
<u>1,823.39</u>	<u>\$2,768.84</u>	<u>\$2,275.42</u>	<u>\$716.36</u>
<u>2,309.26</u>	<u>\$10,246.08</u>	<u>\$555.07</u>	<u>\$4,174.49</u>
2,860.29	\$2,866.43	\$2,934.25	\$2,964.91
551.03*	7,379.65*	2,379.18*	1,209.58
<u>275.51*</u>	<u>\$3,689.82</u>	<u>\$1,189.59*</u>	<u>\$604.79</u>
<u>275.51*</u>	<u>\$3,689.82</u>	<u>\$1,189.59*</u>	<u>\$604.79</u>

1000

1000

and earnings and of the other matters referred to in said order, but the carrier states:

1

That said report is not filed voluntarily, but by compulsion and under protest, and for the sole purpose of avoiding prosecutions and possible penalties.

2

That this Commission has no lawful or constitutional right to require the carrier to make or file said report for the purposes set out in said order.

3

That so much of the Transportation Act, 1920, amending the Interstate Commerce Act, as purports to require the carrier to give up or pay over to this Commission any part of the carrier's earnings or income, is unconstitutional and void, for that the enforcement of so much of said Act against the carrier would deprive it of its property without due process of law, and take its property for public use without just compensation, in contravention of the 5th Amendment to the Constitution of the United States.

[fol. 43] That said order of the Commission, of date March 16, 1922, because based and wholly predicated upon Section 15a of the Interstate Commerce Act which was added thereto by Section 422 of the said Transportation Act, 1920, is likewise unconstitutional and void for that the enforcement of that portion of said order requiring the carrier to pay over to this Commission any part of its earnings or income, would deprive the carrier of its property without due process of law, and take its property for public use without just compensation, in contravention of the 5th Amendment to the Constitution of the United States.

5

The carrier protests against the accuracy of the preliminary bases prescribed in and by said order of the Commission, and all rights are expressly reserved to the carrier to object to any conclusions which may be reached by the Commission upon the report filed herewith, and to any report or order made thereon or in connection therewith, and to contest in all proper and legal ways, the enforcement of any order based upon said report or any part thereof, or upon said bases prescribed by the Commission, and to so contest all efforts of the Commission and of the United States of America to require the carrier to pay over to the Commission, or to any other person whomsoever, without its consent, any portion of the carrier's earnings, income, money or property.

Respectfully submitted, Dayton-Goose Creek Railway Company, By (Signed) J. J. Balderach, Vice-President.

(Here follows statement, marked side folio page 44.)

4-330

Minnesota State Library,
St. Paul, Minn.

[fol. 45]

Dayton-Goose Creek Railway Company

STATEMENT OF INVESTMENT IN ROAD AND EQUIPMENT, NET RAILWAY OPERATING INCOME, BY MONTHS, FOR THE YEAR ENDED DECEMBER 31, 1920, AND EXCESS RAILWAY OPERATING INCOME FOR THE TEN (10) MONTHS OF 1920, MARCH 1, 1920, TO DECEMBER 31, 1920, UNDER PROVISIONS OF SECTION 15a OF THE INTERSTATE COMMERCE COMMISSION

Investment in Road and Equipment

	Oct. 31, 1920	Nov. 30, 1920	Dec. 31, 1920	Monthly Ledger Balances, Rate of Return, under Section 15a, 6% per annum or .006 mills per month.
	\$599,428.93	\$617,424.89	\$613,994.82	
	.005	.005		
For Nov., 1920		For Dec., 1920		
	\$2,997,144.65		\$3,087,124.45	Amount of Fair Return at 5% per annum.

Net Railway Operating Income

	Sept., 1920	Oct., 1920	Nov., 1920	Dec., 1920
Railway Operating Revenues.....	\$32,579.82	\$34,056.03	\$31,943.79	\$35,092.52
Railway Operating Expenses.....	20,306.89	22,732.39	25,960.22	33,655.60
Net Revenue from Railway Operations.....	\$12,272.93	\$11,323.64	\$5,983.57	\$1,436.92
Railway Tax Accruals:				
Ad Valorem, etc.....	\$299.86	\$299.86	\$299.86	\$299.86
Income and Excess Profits.....	2,298.36	1,984.56	271.39	.....
Total.....	\$2,598.22	\$2,284.42	\$571.25	\$299.86

Railway Operating Income.....	\$9,674.71	\$9,039.22	\$5,412.32	\$1,137.06
Deductions:				
Hire of Eqpt. Rents, Net (Accts. 503-507-536-540).....	\$1,646.71	\$1,887.55	\$2,162.50	\$2,050.38
Joint Facility rents, Net (Accts. 503-541)	34.95	34.95	34.95	68.27
Total Deduction from Railway Operating Income..	\$1,681.66	\$1,922.50	\$2,197.45	\$2,118.65
Net Railway Operating Income.....	\$7,993.05	\$7,116.72	\$3,214.87	\$981.59*
Less Returns at 6%.....	\$2,938.60	\$2,959.56	\$2,997.14	\$3,087.12
Excess Net Railway Operating Income.....	5,054.45	4,157.16	217.73	4,068.71*
Total Division under Section 15a for 10 Mo., March, 1920, to Dec. 31, 1920, I. C. C. 50%...	\$2,527.22	\$2,078.58	\$108.87	\$2,034.35*
D. G. C. Railway Company 50%.....	\$2,527.23	\$2,078.58	108.86	\$2,034.36*

Dayton, Texas, April 25, 1922.

J. J. Balderach, Vice-President and Treasurer.

* Deficit.

To the Interstate Commerce Commission:

Now comes Dayton-Goose Creek Railway Company, hereinafter called "carrier, and, in compliance with this Commission's order of March 16, 1922, in the matter of the recovery and payment of excess railway operating income under the provisions of Section 15a of the Interstate Commerce Act, files herewith a report of income and earnings and of the other matters referred to in said order, but the carrier states:

1

That said report is not filed voluntarily, but by compulsion and under protest, and for the sole purpose of avoiding prosecutions and possible penalties.

2

That this Commission has no lawful or constitutional right to require the carrier to make or file said report for the purposes set out in said order.

3

That so much of the Transportation Act, 1920, amending the Interstate Commerce Act, as purports to require the carrier to give up or pay over to this Commission any part of the carrier's earnings or income, is unconstitutional and void, for that the enforcement of so much of said Act against the carrier would deprive it of its property without due process of law, and take its property for public use without just compensation, in contravention of the 5th Amendment to the Constitution of the United States.

[fol. 47]

4

That said order of this Commission, of date March 16, 1922, because based and wholly predicated upon Section 15a of the Interstate Commerce Act which was added thereto by Section 422 of the said Transportation Act, 1920, is likewise unconstitutional and void for that the enforcement of that portion of said order requiring the carrier to pay over to this Commission any part of its earnings or income, would deprive the carrier of its property without due process of law, and take its property for public use without just compensation, in contravention of the 5th Amendment to the Constitution of the United States.

5

The carrier protests against the accuracy of the preliminary bases prescribed in and by said order of the Commission, and all rights are expressly reserved to the carrier to object to any conclusions

which may be reached by the Commission upon the report filed herewith, and to any report or order made thereon or in connection therewith, and to contest in all proper legal ways, the enforcement of any order based upon said report or any part thereof, or upon said bases prescribed by the Commission, and to so contest all efforts of the Commission and of the United States of America to require the carrier to pay over to the Commission, or to any other person whomsoever, without its consent, any portion of the carrier's earnings, income, money or property.

Respectfully submitted, Dayton-Goose Creek Railway Company, By (Signed) J. J. Balderach, Vice President.

[fol. 48] Dayton-Goose Creek Railway Company

Statement of Net Railway Operating Income
and

Excess Railway Operating Income Under Provisions of Section 15a
Year 1921

Railway Operating Revenues.....	\$370,018.81
Railway Operating Expenses.....	258,333.81
Net Revenue from Railway Operations.....	<u>\$111,685.00</u>
Railway Tax Accruals.....	\$30,182.38
Ad Valorem.....	\$4,111.51
Income and Excess Profits, etc.....	<u>26,070.87</u>
Uncollectible Railway Revenues.....	436.84
Total	<u>\$30,619.22</u>
Railway Operating Income.....	<u>\$81,065.78</u>
Deductions:	
Hire of Equipment Rents—Net (Accts. 503/507-536/540)	\$7,923.88
Joint Facility Rents—Net (Accounts 508-541).....	192.95
Total Deductions from Ry. Operating Income.....	<u>\$8,116.83</u>
Net Railway Operating Income.....	<u>\$72,948.95</u>

Amount of returns at 6% per annum on Investment in Road and Equipment (See exhibit attached)...	\$39,181.96
Excess of Net Railway Operating Income over 6% on Investment in Road and Equipment.....	<u>\$33,766.99</u>

Division under Section 15a, I. C. C. 50%	<u>\$16,883.49</u>
--	--------------------

Dayton-Goose Creek Railway Company 50%	<u>\$16,883.50</u>
--	--------------------

Dayton, Texas, April 25, 1922.

J. J. Balderach, Vice-President and Treasurer.

Dayton-Goose Creek Railway Company

STATEMENT OF INVESTMENT IN ROAD AND EQUIPMENT AND RETURNS THEREON AT 6% PER ANNUM FOR THE YEAR ENDED DECEMBER 31, 1921

	Amount	Rate of return	Amount of return
Investment in Road and Equipment, Ledger Balance 12/31/20.....	\$613,994.82		
Delayed charges and adjustments, year 1921.....	26,253.41		
Total	\$640,248.23	6% per an.	\$38,414.89
Additions and Betterments year 1921, see detail below.....	59,254.73		767.07
Total Investment in Road and Equipment.....	\$699,502.96		\$39,181.96

Additions and Betterments

A. F. E.	Project	Date completed and turned over to operation or retired	Length of time in service or retired to Dec. 31, 1921	Cost	Rate of return
57	Office Equipment.....	April 30, 1921	8 mo.	\$143.41	.005 per mo.
21	Extension Depot, Goose Creek.....	Jan'y. 21, 1921	11 mo. 9 days	1,757.27	.005 per mo.
26	Sand House, Goose Creek.....	Jan'y. 21, 1921	11 mo. 9 days	485.83	.005 per mo.
27	Cattle Guards.....	Feb'y. 7, 1921	10 mo. 23 days	275.05	.005 per mo.
51	Water Station Abandoned.....	April 27, 1921	8 mo. 3 days	850.98*	.005 per mo.
54	Bunk House, Goose Creek.....	May 7, 1921	7 mo. 23 days	900.00	.005 per mo.
48	Revetments and Dams—Retired June 11, 1921..	May 12, 1921	1 mo.	1,463.71	.005 per mo.
49	Rail Rests.....	May 16, 1921	7 mo. 14 days	109.02	.005 per mo.

*Credit.

Additions and Betterments—Continued

A. E. E.	Project	Date completed and turned over to opera- tion or retired	Length of time in service or retired to Dec. 31, 1921	Cost	Rate of return	
50	Property Line Posts.....	June 21, 1921	6 mo. 9 days	155.03	.005 per mo.	4.88
52	Corrugated Drains.....	June 22, 1921	6 mo. 8 days	314.66	.005 per mo.	9.84
2	Passing Track Baytown.....	June 30, 1921	6 mo.	5,356.53	.005 per mo.	160.70
58	Machinery and Tools.....	June 30, 1921	6 mo.	1,182.16	.005 per mo.	35.46
56	Right of Way Fences—Progress to.....	June 17, 1921				
		July 13, 1921	26 days	1,735.12	.005 per mo.	7.52
46	Drain Ditch.....	March 26, 1921	9 mo. 14 days	524.96	.005 per mo.	24.80
74	Engine House.....	Feb'y. 28, 1921	10 mo.	211.40	.005 per mo.	10.57
61	Ballasting Fields Luttman's Spur.....	Sept. 15, 1921	3 mo. 15 days	466.75	.005 per mo.	8.17
56	Right of Way Fences.....	July 3, 1921	5 mo. 17 days	1,819.32	.005 per mo.	50.61
66	Foamite Fire Engine.....	Nov. 3, 1921	1 mo. 27 days	339.03	.005 per mo.	3.21
69	Extending Stem of "Y".....	Nov. 13, 1921	1 mo. 17 days	114.08	.005 per mo.	.89
67	Rip Track Goose Creek.....	Nov. 17, 1921	1 mo. 13 days	249.82	.005 per mo.	1.79
2	Passing Track.....	Dec. 21, 1921	9 days	7,402.95	.005 per mo.	11.10
				\$18,878.05		
				Less No. 2 above.....		
				5,356.53		
				<u>\$7,521.52</u>		
				118.57		
				Less Retirements.....		
60	Stock pen Mt. Belview.....	Dec. 31, 1921	none	386.30	.005 per mo.	None
70	Stock pen Esperson.....	Dec. 31, 1921	none	347.30	.005 per mo.	None
53	Caboose.....	July 5, 1921	5 mo. 23 days	985.49	.005 per mo.	28.73
79	Retirement 4 flat cars.....	Dec. 31, 1921	none	2,780.00*	.005 per mo.	None
77	Retirement Loco. 101.....	Dec. 31, 1921	none	2,418.53*	.005 per mo.	None
72	Locomotive No. 104.....	Dec. 16, 1921	14 days	25,343.89	.005 per mo.	59.13
55	Ballasting Main line.....	Always in operation—see below		16,433.99	.005 per mo.	190.51

Monthly Balances :

June, 1921,	\$93.18	1 month for July at .005 per mo.	\$.46
July, 1921,	820.27	1 month for Aug. at .005 per mo.	4.10
Aug., 1921,	5,041.48	1 month for Sep. at .005 per mo.	25.21
Sep., 1921,	8,307.49	1 month for Oct. at .005 per mo.	41.54
Oct., 1921,	9,921.94	1 month for Nov. at .005 per mo.	49.61
Nov., 1921,	13,918.65	1 month for Dec. at .005 per mo.	69.59
Dec., 1921,	16,433.99		

Total Additions and Betterments and amount of Retirements..... \$62,453.56

Less Retirement of Revetments and Dams..... \$1,463.71

Less Right of Way Fences, A. F. E..... 1,735.12

Total Deductions, Additions and Betterments..... \$3,198.83

Amount of Additions and Betterments shown above..... \$59,254.73

Dayton, Texas, April 25, 1922.

*Credit.

J. J. Balderach, Vice-President and Treasurer.

767.07

[fol. 50]

EXHIBIT "E" TO PETITION

Interstate Commerce Commission

Washington, October 20, 1922.

Mr. J. J. Balderach,
V. P. & Treas. Dayton-Goose Creek Railway Co.,
Dayton, Texas.

DEAR SIR:

Referring to our letter to you of September 23, 1922, in which the following statement was made:

"The returns as filed show excess income as preliminarily computed:

"For the 10 months ended December 31, 1920.....	\$10,833.12
"For the year ended December 31, 1921.....	16,833.49
"Total	\$27,666.61

"Under the terms of the orders one-half of this amount shall be placed in a reserve fund and the remaining one-half remitted to Mr. George B. McGinty, Secretary," etc., you are advised that the statement above quoted was made inadvertently through error.

Referring to the returns of the Dayton-Goose Creek Railway Company to the Commission's orders dated January 16, 1922, and March 16, 1922, "In the matter of the Recovery and Payment of Excess Railway Operating Income under the Provisions of Section 15a of the Interstate Commerce Act," you are now advised as follows:

The returns as filed show excess income as preliminarily computed:

For the 10 months ended December 31, 1920.....	\$21,666.24
For the year ended December 31, 1921.....	33,766.99
Total	\$55,433.23

[fol. 51] Under the terms of the orders one-half of this amount should be placed in a reserve fund, and the remaining one-half should be paid by remittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, Secretary of the Interstate Commerce Commission, Washington, D. C. You are again requested to fully comply with the orders by:

(a) advising the title of the fund account in which one-half of such excess was placed, when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held;

(b) remitting promptly to the Secretary of the Commission the remaining one-half of the excess income so preliminarily computed.

Very truly yours,

Charles D. Mahaffie, Director.

[fol. 52] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF TEXAS AT BEAUMONT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed Jan. 8,
1923

Answer of Interstate Commerce Commission

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering Paragraph One of the petition, the defendant, Interstate Commerce Commission, hereinafter called the commission, admits, for the purposes of this suit, that the allegations contained in said paragraph are true, except that the commission denies that it is charged with the enforcement of all laws regulating and controlling common carriers by railroad engaged in interstate and foreign commerce and doing business in the United States. The commission admits that, by paragraph (1) of section 12 of the interstate commerce act, it is authorized and directed to execute and enforce the provisions of said act.

II

Answering Paragraph Two of the petition, the commission admits, for the purposes of this suit, that the allegations contained in said paragraph are true.

[fol. 53]

III

Answering Paragraph Three of the petition, the commission admits that the allegations contained therein are true.

IV

Answering Paragraph Four of the petition, the commission admits that the allegations contained therein are true.

V

Answering Paragraph Five of the petition, the commission denies that the orders referred to were, or that either of them was, entered and made by it for the purpose or with the design of enforcing those

provisions of section 15a of the interstate commerce act, as amended, relating to the recovery by and payment to the commission of excess railway operating income or the establishment or maintenance of the reserve fund mentioned in said section 15a. The commission admits, however, that said orders were, and that each of them was, entered and made by it as a procedural step deemed by it necessary and appropriate for the purpose of enforcing, in so far as with it lies, the provisions of said section 15a, and that said section was added to the interstate commerce act by the transportation act, 1920. For more full and complete information in this connection, the commission refers the court to said orders, which are Exhibits "A" and "B" to the petition.

VI

Answering Paragraph Six of the petition, the commission admits that the allegations therein contained are true, except that the commission denies that by said 1920 order it directed complainant to pay [fol. 54] to the commission one-half of the excess income mentioned not paid into the reserve fund referred to; denies that it made a definite demand for such payment; denies that by said 1921 order the commission directed complainant to pay to the commission one-half of the excess income mentioned; denies that by said 1921 order the commission directed complainant to place in a reserve fund the other one-half of said excess income, and denies that said order contained a definite demand for said payment. The commission alleges that said orders, in so far as they relate to payment to the commission, and placing in reserve funds, of excess income, are simply admonitory and intended to remind complainant of the requirements of said section 15a. For more full and complete information in this connection, the commission refers the court to said orders, which are Exhibits "A" and "B" to the petition.

The commission assumes that the figures "1920", contained in the first line of the first whole paragraph on page 7 of said petition were inserted through error, and that complainant intended to insert instead "1921". The commission denies that its demands upon complainant, or amounts thereof, have become, or are now, definite or fixed, as alleged in said Paragraph Six.

VII

Answering Paragraph Seven of the petition, the commission admits that the allegations therein contained are true.

VIII

Answering Paragraph Eight of the petition, the commission admits that the allegations therein contained are true.

[fol. 55]

IX

Answering Paragraph Nine of the petition, the commission disclaims information sufficient to form a belief as to whether the

allegations contained in said paragraph are, or as to whether any of said allegations is, true.

X

Answering the first subdivision of Paragraph Ten of the petition, the commission denies that it demanded that complainant pay to the commission one-half of the excess income referred to, or any other sum of money, and denies that it demanded, or that either of the orders referred to requires, that complainant set aside in a reserve fund, the other one-half of said excess, twenty-seven thousand seven hundred sixteen dollars and sixty-one cents, or any other sum of money.

Answering the second subdivision of said Paragraph Ten, the commission admits that it is in possession of the originals of the exhibits mentioned, and alleges that if complainant wishes to use, as evidence in this suit, certified copies of said exhibits, it should obtain such certified copies under and in accordance with the provisions of paragraph (13) of section 16 of the interstate commerce act, the language of which is:

The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the commission as required under the provisions of this act shall be preserved as public records in the custody of the secretary of the commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the commission's seal, shall be received in evidence with like effect as the originals.

[fol. 56]

XI

Answering Paragraph Eleven of the petition, the commission denies each of and all the allegations contained in said paragraph.

XII

Answering Paragraph Twelve of the petition, the commission denies that either the provisions of section 15a of the interstate commerce act relative to the payment of excess income to the commission and relative to the establishment and maintenance of a reserve fund, or the construction placed on said provisions by the commission, or the administrative acts of the commission pursuant to said provisions, or the orders or demands of the commission in respect of said provisions, are, or that any of them is, either null, or void, or invalid, for the reasons, or for any of the reasons, set forth in said paragraph, or for any other reason or reasons.

Answering specially subdivision (c) of said paragraph, the commission denies that the orders mentioned take, or that either of them takes, the property of complainant for public use; denies that by said orders, or by either of them, complainant is compelled to invest either the revenues, or the income, or the receipts, or the profits, derived from said property, or any part thereof, in any particular manner or for any particular purpose; denies that by said orders, or by either of them, complainant is either limited or restricted in the expenditure or use of said property, or revenues, or income, or receipts, or profits.

Answering specially subdivision (d) of said paragraph, the commission denies that the involuntary payment by complainant of the money referred to, or any other sum of money, is demanded by the [fol. 57] orders mentioned, or by either of said orders, and denies that the involuntary investment by complainant of the funds referred to, or any part of said funds, is directed in said orders, or in either of said orders.

Answering specially subdivision (e) of said paragraph, the commission denies that either the revenue, or the income, or the profits, referred to, arose or accrued to complainant, or was derived by it from non-carrier sources; denies that the Congress has not the power to take from complainant any part of the rents, or revenues, or income, or profits, mentioned, and denies that any part of said rents, or revenues, or income, or profits, accrued to complainant from rentals, or leases, or trackage rights, or interest, or any sources, wholly disconnected and separated from complainant's transportation or carrier services or from the charges and receipts therefor.

XIII

Answering Paragraph Thirteen of the petition, the commission denies that all the rates, or fares, or charges, referred to, were fixed and determined by orders of the railroad commission, of the State of Texas, and by orders of the commission and denies that the commission is either precluded or estopped from denying or contesting the reasonableness of either said rates, or said fares, or said charges. The commission denies that it has made any effort to compel the payment to it by complainant of the excess earnings referred to, or of any part thereof, which is either unlawful, or unenforceable, for the reasons, or for any of the reasons, set forth in said paragraph, or for any other reason or reasons. In this connection the commission denies that it has made an effort to compel the payment to it by complainant of said excess earnings, or of any part thereof.

Answering specially subdivision (a) of said paragraph, the commission denies that in proceeding Ex parte 74, the commission fixed either the rates, or fares, or tolls, or charges referred to. In this connection the commission alleges that in said proceedings it simply authorized certain increases in rates, fares, and charges which had previously been established and put in force by the interested common carriers.

Answering specially subdivision (b) of said paragraph, the commission disclaims information sufficient to form a belief as to whether the allegations relating to net earnings and property values are true. The commission denies that the claims referred to are, or that any of said claims is, properly chargeable in the accounts of complainant for the years 1920 and 1921, or for either of said years. In this connection the commission alleges that, under rules and regulations prescribed by the commission, complainant charges sums of money paid by it, on account of claims like those mentioned, into its account for the years, respectively, in which the payments are made, regardless of the dates upon which the claims accrue. The commission denies that, as between complainant and the commission, the general level of rates referred to must be presumed to be reasonable.

Answering specially subdivision (c) of said paragraph, the commission denies that, as between complainant and the commission, the commission is estopped from denying the reasonableness of either the rates, or tolls, or charges, or fares, referred to, and denies that the commission has demanded that complainant pay to it the excess earnings mentioned, or any part of said excess earnings.

Answering specially subdivision (d) of said paragraph, the Commission denies that it has demanded that complainant pay to it the excess earnings referred to, or any part of said excess earnings.

[fol. 59]

XIV

Answering Paragraph Fourteen of the petition, the commission denies that by its orders it has demanded that complainant pay to the commission and pay into a reserve fund the sums of money referred to; denies that by said orders, or by either of them, it has demanded either that complainant pay to the commission, or that complainant pay into a reserve fund, any sum of money, and denies that complainant will suffer irreparable injury, or suffer any injury, if the injunction prayed for by the complainant in the petition is not granted by the court.

Further answering the allegations contained in the petition, the commission alleges that said order of January 16, 1922, and said order of March 16, 1922, were, by it, duly made, and duly served upon complainant, under and in accordance with authority conferred upon the commission by the provisions of the interstate commerce act, and particularly by the provisions of section 15a of said act, and that said provisions are, and that each of said provisions is, constitutional and otherwise valid.

With the exception of the allegations expressly admitted herein by it, the commission denies each of and all the material allegations contained in the petition, in so far as they are, and in so far as any of them is, inconsistent, or in conflict, with the allegations and denials in this answer.

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that the petition be dismissed.

Interstate Commerce Commission. (Signed) P. J. Farrell,
Chief Counsel.

[fol. 60] CITY OF WASHINGTON,
District of Columbia, ss:

Balthasar H. Meyer, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named defendant, and makes this affidavit on behalf of said commission; that he has read the foregoing answer and knows the contents thereof. and that the same is true.

Balthasar H. Meyer.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia this 4th day of January, 1923. Alfred Holmead, Notary Public. (Seal.)

[fol. 61] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

AMENDED MOTION TO DISMISS PETITION—Filed Feb. 26, 1923

Amended Motion to Dismiss

United States of America and Randolph Bryant, United States Attorney for the Eastern District of Texas, defendants herein, by their counsel, now come and move the court to dismiss the Bill of Complaint at the cost of the Complainant.

As grounds for this motion it is shown:

I

The suit is not a suit to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission within the meaning of the Commerce Court Act (36 Stat. 539) and Urgent Deficiencies Act (38 Stat. 219) but is a suit to stay and suspend "orders of the Commission * * * so far as they relate to the payment of money."

II

The suit is not a suit to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission within the meaning of Commerce Court Act (36 Stat. 539) and Urgent Deficiencies Act (38 Stat. 219), but is a suit against the United States and certain of the officers thereof to enjoin it and them from enforcing the laws of the United States, for which suit no jurisdiction in equity has been conferred upon the United States District Court for the Eastern District of Texas.

[fol. 62]

III

From the face of the Bill of Complaint it appears that the Complainant has complied with, or undertaken to comply with, the two

orders of the Interstate Commerce Commission about which Complaint is made; that is to say, upon the entry and service of the order of January 16, 1922, (Exhibit A, p. 33), complainant filed with the Commission its statement in response thereto (Exhibit C, p. 43); and upon the entry and service of the order of March 16, 1922, (Exhibit B, p. 39), complainant filed with the Commission its statement in response thereto (Exhibit D, p. 47); wherefore there is now no action impending or threatened by the Commission which a court of equity may enjoin.

IV

Section 422 of the Transportation Act, 1920, provides that any carrier receiving a net railway operating income substantially and unreasonably in excess of a fair return upon the value of the railway property held for and used in the service of transportation, such excess shall be held by the carrier as trustee for, and shall pay it to the United States; and if any carrier receives for any year a net railway operating income in excess of six (6) per centum of the value of such railway property, one half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund; and the general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission.

The Complainant obviously anticipates a suit by the Commission to recover funds due and owing under the foregoing Section 422 of [fol. 63] the Transportation Act 1920, and Complainant has brought this suit to the end that Complainant prematurely may set up and have adjudicated in advance the merits of the case so anticipated.

V

The Bill of Complaint is without equity on its face and the Court may not grant the relief prayed or any part of the same.

VI

The Bill of Complaint is argumentative.

Wherefore defendants pray that their motion be sustained.

(Signed) Blackburn Esterline, Assistant to the Solicitor General. (Signed) Randolph Bryant, United States Attorney.

(Signed) S. D. Bennett, Assistant United States Attorney.

[fol. 64] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

STATEMENT OF THE EVIDENCE—Filed March 24, 1923

Statement of the Evidence

On the hearing of the above numbered and entitled cause held at New Orleans, La., February 16, 1923, on Complainant's application for a preliminary injunction the following, and only the following evidence was introduced, to-wit:

1

The plaintiff offered in evidence the several exhibits attached to and made a part of the petition or bill of complaint to which reference is here made for the contents thereof.

2

The Complainant thereupon offered in evidence certain affidavits or exhibits, which, the formal parts being omitted, are as follows, to-wit:

EVIDENCE: COMPLAINANT'S EXHIBIT No. 1

Report of Value of Dayton-Goose Creek Railway Company's Property as of June 30th, 1922, to the Secretary of State of the State of Texas

Office of the Railroad Commission of Texas

In accordance with the provisions of the Revised Civil Statutes of Texas, 1911, Article 6719, the Railroad Commission of Texas finds the present value, as of June 30, 1922, of the lines of railway, property rights and franchises of the Dayton-Goose Creek Railway Company [fol. 65] pany to be equal to the sum of Nine Hundred and Thirty-four Thousand Five Hundred and Forty-two Dollars and Forty-two Cents (\$934,542.42) made up as follows:

1. Engineering	\$32,101.95
2. Land for transportation purposes.....	79,220.02
3. Grading	56,057.68
6. Bridges, Trestles and culverts.....	47,985.75
8. Ties	118,092.99
9. Rails	114,377.70
10. Other track material.....	33,516.43
11. Ballast	113,616.75
12. Track laying and surfacing.....	79,178.78
13. Right of way fences.....	11,671.20
14. Crossings and signs.....	2,283.65
16. Station & Office Buildings.....	13,352.30
17. Roadway Buildings	14,075.98
18. Water Stations	323.64
19. Fuel Stations.....	241.15
20. Shops and engine houses.....	7,176.53
26. Telegraph and telephone lines.....	4,521.52
27. Signals and interlockers.....	19,225.24
37. Roadway machines	1,807.62
38. Roadway small tools.....	1,515.35
40. Revenues and operating expense, credit.....	4,142.39
43. Other expenditures of road.....	681.75
44. Shop Machinery	6,479.46

Total accounts 1 to 47, inclusive.....	\$753,361.05
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Equipment accounts 51 to 58, inclusive.....	71,441.49
General Expenditures accounts 71 to 77.....	10,112.12
Interest during construction, account 76.....	41,520.08

Total accounts 1 to 77.....	876,434.74
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6% Franchise value	52,586.08
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Grand total	929,020.82
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It appearing that the Dayton-Goose Creek Railway Company, through its President, R. S. Sterling, has waived notice of valuation required by the terms of Article 6719, Revised Statutes of 1911, and has stated that it has no objection to the report of value upon its property by this Commission:

Therefore, it is ordered by the Railroad Commission of Texas that the above report of value be forthwith made to the Secretary of State of the State of Texas and deposited in his office, there to remain as a limitation to the issuance and registration of securities as the law provides.

[fol. 66] Railroad Commission of Texas. Allison Mayfield, Chairman. Earle B. Mayfield, Commissioner. Attest: E. R. McLean, Secretary. (Seal.)

EVIDENCE: COMPLAINANT'S EXHIBIT NO. 2

My name is A. E. Kerr; I am the Vice President and General Manager of Dayton-Goose Creek Railway Company, complainant in the above styled and numbered cause, and have been such ever since a date prior to the time when the railroad of said Company was completed and opened for operation, which occurred on or about the 15th day of May, 1918; and ever since said road was opened for operation, I have been in charge of the operating department thereof;

That by an order made and entered on or about the 10th day of November, A. D., 1922, the Railroad Commission of Texas, acting in accordance with the provisions of Article 6719 of the Revised Statutes of Texas, of 1911, found the present value, as of the 30th day of June, A. D., 1922, of the lines of railroad, property, rights and franchises of Dayton-Goose Creek Railway Company to be the sum of Nine Hundred Twenty-nine Thousand Twenty and 82/100 (\$929,020.82) Dollars. In my opinion, the property of the said Dayton-Goose Creek Railway Company, held for and used in the service of transportation, on the 30th day of June, A. D., 1922, was not less than the sum so found as the value thereof by the Railroad Commission of Texas.

[fol. 67] That the additions and betterments made to the properties of said complainant, between the first day of January, 1922, and the 30th day of June, 1922, less retirements, cost, and had an actual value of Twenty-one Thousand Seven Hundred and Ninety eight and 93/100 (\$21,798.93) Dollars. That the additions and betterments, less retirements, made to the properties of said carrier, during the calendar year 1921, cost and had an actual value of not exceeding Fifty-nine Thousand Two Hundred Fifty-four and 73/100 (\$59,254.73) Dollars; and the additions and betterments, less retirements, made to the properties of said carrier during the calendar year 1920, cost and had an actual value of not exceeding One Hundred Two Thousand Five Hundred Ninety-Six and 72/100 (\$102,596.72) Dollars;

That in my opinion, the value of the property of said complainant, held for and used in the service of transportation, as of the 31st day of December, A. D., 1921, was not less than Nine Hundred Seven Thousand Two Hundred Twenty-one and 89/100 (\$907,221.89) Dollars, and as of the 31st of December, A. D., 1920, was not less than the sum of Eight Hundred Forty-seven Thousand Nine Hundred Sixty-seven and 16/100 (\$847,967.16) Dollars, and as of the 31st day of December, A. D., 1919, was not less than the sum of Seven Hundred Forty-five Thousand, Three Hundred Seventy and 44/100 (\$745,370.44); and, in my opinion, the fair average value of the property of said carrier, held for and used in the service of transportation during the calendar year 1920, was not less than the sum of Seven Hundred Ninety-six Thousand Six Hundred Sixty-eight and 80/100 (796,668.80) Dollars, and the fair value of the [fol. 68] property of said carrier held for and used in the service of

transportation during the calendar year 1921 was not less than the sum of Eight Hundred Seventy-seven Thousand Five Hundred Ninety-four and 52/100 (\$877,594.52) Dollars.

The betterments for 1920 and 1921 were distributed throughout the year and the last two figures of value for those years were obtained by adding one-half of the year's betterments costs to the total value of the preceding December 31st.

EVIDENCE: COMPLAINANT'S EXHIBIT No. 3

"Before me, the undersigned authority, on this date personally appeared Julius H. Parmelee, who being first duly sworn, deposes, and says upon his oath as follows:

I am at present the Director of the Bureau of Railway Economics, an organization supported by many of the principal railway companies of the United States, for the purpose of compiling and studying railroad statistics. I have been connected with this Bureau for about twelve years, and was for about two years prior to my association with the Bureau of Railway Economics, a special examiner for the Interstate Commerce Commission, and in that connection my duties led me to deal exclusively with railway accounts and railway statistics.

In Increased Rates 1920 (58 ICC 229) the Interstate Commerce Commission found that "the value of steam-railway property of the carriers subject to the act, held for and used in the service of transportation" in the Western group as defined in the Commission's report in that proceeding was \$8,100,000,000. This finding of value by the Interstate Commerce Commission included the carrier property of all of the railroads in the Western group reporting to the Commission, including not only what is known as Class I railways, being those carriers with annual operating revenues in excess of \$1,000,000, but also all other railways in that group.

Neither the Interstate Commerce Commission nor the Bureau of Railway Economics normally compile summaries except for railways of Class I as defined above, because in a study of the statistics of all carriers for the years 1915 and 1916 it was found that the net railway operating income of Class I roads in the Western group represented 98.36 per cent of the total of all carriers in that group, and the number of carriers other than Class I roads reporting to the Commission is so great that neither the Commission nor the Bureau of Railway Economics has deemed it profitable to compile complete statistics concerning these secondary roads. The consequence is that the net railway operating income of all of the carriers in the Western group for recent years has not been made available by compilation of the reports made by all of these individual carriers, but at page XLII of the Interstate Commerce Commission's Statistics of Railways for 1920 (Statement No. 33: Corporate income and profit and loss accounts of Class I carriers for the year ended December 31, 1920)

there are shown the corporate earnings and expense of Class I railways in the Western group for the calendar year 1920.

Inasmuch as the railways were in the possession and control of the Federal government during the first two months of the year 1920, the operating revenues, operating expenses, taxes, railway operating income, and net railway operating income shown in the [fol. 70] above mentioned statement relate to the ten months' period, March 1 to December 31 inclusive, 1920. These revenues, expenses, etc., were as follows:

10 Months, March 1 to Dec. 31, 1920

I. C. C. Statistics of Railways, 1920, P. XLII

Account

1. Railway operating revenues.....	\$2,068,612,359
2. Railway operating expenses.....	1,833,814,990
3. Net revenue from railway operations.....	234,797,369
4. Railway tax accruals.....	109,133,331
5. Uncollectible ry. revenues.....	392,572
6. Railway operating income.....	125,271,465
7. Hire of equipment—net balance Dr.....	14,061,654
8. Joint facil. rents—net balance Dr.....	9,125,455
9. Net railway operating income.....	102,084,357

Item 7 above is the sum of hire of freight cars—credit balance, rent from locomotives, rent from passenger-train cars, rent from floating equipment, and rent from work equipment, minus the sum of hire of freight cars—debit balance, rent for locomotives, rent for passenger-train cars, rent for floating equipment, and rent for work equipment. Item 8 is the difference between joint facility rent income and joint facility rents. Item 9 is Item 6 above, minus Items 7 and 8 above. The result thus obtained is net railway operating income as defined in paragraph 1 of section 15a of the Transportation Act.

In a memorandum of the Interstate Commerce Commission dated January 12, 1922, entitled "The Seasonal Variation of Railway Operating Income," it was stated that the Class I railways in the Western group normally earn 89 per cent of their yearly net railway operating income during the last ten months of the year. Therefore, by equating the earnings for the above mentioned ten [fol. 71] months' period of 1920, it may be assumed that the Class I railways of the Western group earned during the period from March 1 to December 31, at the annual rate of \$114,701,525. Upon the assumption that the net railway operating income of Class I roads in the Western group represents 98.36 per cent of the total for all carriers in that group (as assumption utilized by the Commission itself in Reduced Rates, 1922: 68 I. C. C. 693) the total net railway operating income for all of the carriers in the Western group, subject to the Interstate Commerce Act, for the ten months' period mentioned, was at an annual rate of \$116,613,995. This net

income, upon the valuation found by the Commission for all of the roads in the Western group of \$8,100,000,000, shows earnings of 1.44 per cent upon the valuation of the property of those carriers held for and used in the service of transportation.

In addition to the finding by the Interstate Commerce Commission of the valuation of carrier property in the Western group, its memorandum of October 23, 1922, page 5, states that the net additions to Class I carrier property in the Western group made during 1920 amounted to \$212,515,238, thus giving an estimated value of all steam roads in the western group on January 1, 1921, as not less than \$8,312,515,238.

The Interstate Commerce Commission's Statistics of Common Carriers for 1921, page 8, states that the earnings of Class I roads in the Western group for the twelve months ended December 31, 1921, were as follows:

12 Months, Jan. 1 to Dec. 31, 1921

I. C. C. Statistics of Common Carriers, 1921, P. 8

Account

1. Railway operating revenues.....	\$2,178,605,294
2. Railway operating expenses.....	1,739,860,450
3. Net revenue from railway operations.....	438,744,844
4. Railway tax accruals.....	126,428,571
5. Uncollectible ry. revenues.....	871,090
6. Railway operating income.....	311,445,183
7. Hire of equipment—net balance Dr.....	22,545,231
8. Jt. facility rents—net balance Dr.....	10,425,111
9. Net railway operating income.....	278,474,841

[fol. 72] Equating the net earnings of Class I roads by the formula previously described, using 98.36 per cent of the total as representing the earnings of Class I roads, we find that the total net railway operating income for all roads in the Western group for the calendar year 1921 was \$283,117,976. This gives a rate of return of 3.41 per cent upon a property valuation, as above set forth, of \$8,312,515,238.

The statistics set out above, including the valuation found by the Commission, the net railway operating income, and the rate of return for the two periods mentioned above, that is to say, the last ten months of 1920 and the calendar year 1921 may be summarized as follows:

	10 months, Mar. 1 to Dec. 31, 1920 (annual basis).	12 months, Jan. 1* to Dec. 31, 1921
Tentative valuation.....	\$8,100,000,000	\$8,312,515,238
Net Railway oper. income.....	116,613,995	283,117,976
Rate earned on tentative valuation—annual basis.....	1.44%	3.41%

While the railroads of the United States do not concur except perhaps in a few instances in the valuation of carrier property stated by the Interstate Commerce Commission in the report which it made in the proceeding above referred to (58 I. C. C. 229), and while the principal railways of the United States contend that the valuation of their property is substantially larger than that stated by the Commission in this report, nevertheless, for purposes of conservative statement I have regarded it as proper in this connection to [fol. 73] use the figures arrived at and found by the Interstate Commerce Commission, because the book value of the railroads of the United States, and the book value of the roads in the Western group is considerably in excess of the findings so made by the Commission, and would, therefore, indicate if used, a smaller rate of return than that which is arrived at by using the figures of the Commission.

So far as the revenue and expense accounts of the carriers are concerned for the twenty-two months above referred to, they are not only compiled by the Interstate Commerce Commission, but are also compiled by the Bureau of Railway Economics from duplicate reports sent to it, and therefore scrutinized under my supervision by the Bureau of Railway Economics, and it is therefore my opinion that the revenue, expense and income accounts of the Class I roads in the Western group given above are correct.

It is obvious that the results stated above of the study of the net income of Class I roads as compared with the net income of all roads for the years 1915 and 1916 would probably not be precisely accurate in any other year or years, but it is my opinion, and I assume from the fact that the Interstate Commerce Commission does not compile complete statistics for all roads, that it must also be of the opinion, that the results arrived at by using this equation figure of 98.36 per cent are substantially correct, and that in figuring the net rate of return as I have given it above, any error which might exist would be so small as to be entirely negligible for practical purposes. The same thing may be said of the statement that the Class I roads in the Western group normally earn 89 per cent of their yearly income during the last ten months of the year. This figure may be [fol. 74] slightly excessive in some years and somewhat too low in other years, but in view of the fact that its use has led to a rate of return for the ten months' period ending December 31, 1920, of 1.44 per cent and 3.41 per cent for the calendar year 1921, any error which might exist in this assumption would not materially change that rate of return.

Based upon the studies which I have made of railway earnings in the Western group for the periods above mentioned, that is, (a) March 1, 1920 to December 31, 1920, inclusive, and (b) the calendar year 1921, it is my opinion that the net railway operating income of all steam railroads in the Western group, as defined by the Interstate Commerce Commission in its aforesaid report, was not in excess of 1.44 per cent upon the valuation of their property held for and used in the service of transportation during the last ten months

of 1920, and was not in excess of 3.41 per cent upon the valuation of their said property in the calendar year 1921.

EVIDENCE: COMPLAINANT'S EXHIBIT No. 4

"My name is J. J. Balderach. I reside in the town of Dayton, Liberty County, Texas. I am one of the Vice-Presidents and the Treasurer of Dayton-Goose Creek Railway Company, Complainant in the above styled and numbered cause. I am also the head of the Accounting Department of said carrier and all of its accounts are kept under my immediate supervision.

I have carefully read the petition of said company filed in this cause on the 6th day of December, 1922.

As alleged in Paragraph Nine of said Petition the reports of Dayton-Goose Creek Railway Company, copies of which are attached to said petition as Exhibit "C" and Exhibit "D," directly reflected the [fol. 75] receipts, expenses, earnings, income, assets, properties, property costs and book value, according to the rules and requirements of the Interstate Commerce Commission, and that by said reports said company duly reported to the Commission all the facts called for in each of said respective orders in accordance with the rules prescribed in said orders and in accordance with the books, records and accounts of said Company for the respective periods covered by said reports as of the dates of said respective reports and as kept in accordance with the accounting rules of the Interstate Commerce Commission.

That in my opinion the value of the property of said Company devoted to the service of transportation, as shown upon said reports, respectively, does not represent the true value of such property as of the periods covered by said respective reports, which true value, in the opinion of affiant, is substantially in excess of any value shown in either of said reports. That both of said reports were compiled, checked and verified by affiant and that in making said reports affiant used the values shown therein because he understood the rules of the Commission contained in the orders referred to in said petition to compel said Company to use and set up the value of said property from its books and accounts.

Affiant further says that said reports do not and will not in the future directly reflect the actual receipts, expenses and income properly and equitably attributable to said respective periods of time, as is more fully alleged in sub-division (b) of Paragraph Thirteen of said petition. In this connection Affiant further swears that on or about the 15th day of November, A. D., 1920, a shipment of rice bags consigned by Mente & Company to their own order, notify Old [fol. 76] River Company at Mont Belvieu, Texas, was delivered to Dayton-Goose Creek Railway Company at Dayton, Texas, having originated in the State of Arkansas on the line of road of St. Louis-Southwestern Railway Company, the said Dayton-Goose Creek Rail-

way Company being shown in the billing as the delivering carrier. That by mistake and error the Agent of the Dayton-Goose Creek Railway Company, on or about the 15th day of November, 1920, delivered said carload of bags to the said Old River Company without requiring the surrender of the original negotiable bill of lading. That the said Old River Company, a corporation, though frequently requested has heretofore failed and still fails to produce and surrender to Dayton-Goose Creek Railway Company said original bill of lading, which, according to affiant's best information and belief, was attached to a draft drawn by the said Mente & Company of New Orleans, La., upon the said Old River Company for the sum of, to wit: \$8,702.00; that thereafter the said Mente & Company instituted suit in the Parish of Bossier, State of Louisiana, against the said St. Louis-Southwestern Railway Company as the initial carrier of said interstate shipment of rice bags for the amount of said draft, which was the amount for which said bags had been sold by the said Mente & Company to the said Old River Company. At the time of said erroneous delivery of said bags to the said Old River Company the same had a reasonable market value, at said time and place, in excess of \$2,500.00; that said suit is still pending in the District Court of Bossier Parish, La., and that the only question in said suit, so far as affiant knows, relates to the proper measure of damages, plaintiff claiming the contract price of said bags, to-wit: \$8,702.00, and the defendant contending for a liability not in excess of the market value of said bags at the time and place of said erroneous [fol. 77] delivery, which, according to affiant's best information and belief, was considerably less than the amount sued for, but nevertheless in excess of \$2,500.00. That Dayton-Goose Creek Railway Company will be obliged, whenever said suit is finally determined, to pay to the defendant therein the amount of judgment rendered against it in said cause, which affiant believes will be in excess of \$2,500.00. That the said Old River Company is now and has been for some time last past hopelessly insolvent and according to affiant's best information and belief will never be able to pay more than a small percentage of its outstanding obligations. Therefore, on account of said erroneous delivery occurring on or about the 15th day of November, 1920, Dayton-Goose Creek Railway Company incurred a liability for which it has no recourse in full against any person, firm or corporation, the agent who made said erroneous delivery being wholly unable to pay the amount of such liability and that such sum as Dayton-Goose Creek Railway Company may ultimately be obliged to pay on account of said erroneous delivery actually arose and accrued during the month of November, 1920.

That there is now pending before the Interstate Commerce Commission, Docket No. 14122, a complaint by Lubrite Refining Company against Dayton-Goose Creek Railway Company and other carriers by railroad, in which reparation is sought to be recovered on account of the assessment and collection upon certain shipments of crude petroleum oil from Goose Creek, Texas, to East St. Louis, Ill., which moved on various dates between the first day of March, 1920,

and the 31st day of December, 1921, on rates which complainant alleges to have been unjust, unreasonable, unlawful and excessive. The testimony in said cause has been heard by an Examiner of the [fol. 78] Interstate Commerce Commission and briefs have been filed therein, but, so far as affiant knows, said cause has not been decided by said Commission. That the charges upon some of said shipments involved in said proceeding were assessed and collected during the calendar year 1920, subsequent to the first day of March of that year, and others during the calendar year 1921. That if the Commission should award, and carriers should be held liable to pay, reparation for the assessment and collection of said rates and charges, Dayton-Goose Creek Railway Company will be obliged to pay a portion of said reparation, the amount of which affiant can not, of course, determine at this time, but if the Commission should award it, and the carriers should be adjudged to pay the reparation upon the basis claimed by the petitioner in said proceeding the Dayton-Goose Creek Railway Company, according to affiant's best judgment and belief, will be obliged to pay approximately \$1,200.00 on that account.

Affiant has carefully checked the records and accounts of Dayton-Goose Creek Railway Company to determine the amount of its railway operating revenues derived from the conduct of intrastate transportation wholly within the State of Texas, as compared with such revenues arising from the conduct of interstate and foreign transportation during the periods covered by the respective reports referred to in said petition. The gross freight revenues of said company, derived from interstate and foreign business during the period commencing March 1, 1920 and ending December 31, 1920, was \$119,597.83; that the intrastate freight revenues of said Company for the same period were \$178,289.32, as shown by the statements attached hereto marked Exhibit "A" and Exhibit "B," respectively, [fol. 79] That the interstate and foreign freight revenue of said company for the calendar year 1921 were \$109,190.30 and the intrastate freight revenue of said Company during the same year was \$238,861.50, as shown by the statements hereto attached, marked Exhibits "C" and "D" respectively. That the passenger revenue of said Company for said respective periods was as follows:

Last ten months of 1920.....	\$8,582.94
Calendar Year 1921.....	10,213.64

That all of said passenger revenue was derived from the conduct of purely intrastate business within the State of Texas, said Company having had during the period involved in this suit no arrangement whatever for through travel or through tickets with any other line of railroad, and every passenger upon the train of said Company being required to pay local fare or purchase local tickets over its line. That, therefore, the freight and passenger revenue of said Company for the last ten months of 1920 and the calendar year 1921, intrastate, as compared with interstate and foreign, was as follows:

	Intrastate	Interstate
Last ten months, 1920.....	\$186,872.26	\$119,597.83
Year, 1921	249,075.14	109,190.30
Total	\$435,947.40	\$228,788.13

From the foregoing it will appear that the receipts of the Dayton-Goose Creek Railway Company from the conduct of purely intrastate business, freight and passenger, was for the last ten months of 1920, 60.97% of the total receipts from intrastate, interstate and foreign traffic, and was for the year, 1921, 69.52% of the same; and considering said two periods as a whole the intrastate receipts amounted to 65.58% of the total receipts for the period commencing March 1, 1920, and ending December 31, 1921.

[fol. 80]

EXHIBIT "A"

Dayton-Goose Creek Railway Company

*Statement of Interstate Freight Traffic Movement and Revenue
Thereon Period March 1, 1920, to December 31, 1920, Inclusive*

	No. car loads, 1920	Tons, 1920	Revenue
Prods. of Agri.:			
Hay	16	192	338.98
Mill Prods.....	9	257	517.88
Oats	4	124	282.60
Potatoes.....	1	12	28.80
Total	30	585	1,168.26
Prods. of Animals:			
None.			
Prods. of Mines:			
Coke	3	116	167.28
Gravel	146	3,531	11,901.04
Coal	8	331	400.83
Crude Oil.....	920	34,797	26,127.63
Oth. Prods. of Mines.....	3	102	486.21
Total	1,080	36,677	39,102.99
Prods. of Forests:			
Lumber	72	2,066	4,504.42
Ties	16	395	492.12
Total	88	2,461	4,996.54

Manufacturers:	No. car loads, 1920	Tons, 1920	Revenue
Pipe	568	18,862	42,715.82
Mchy	33	601	1,802.45
Other Mfgs.	160	3,254	11,172.30
Cement	3	106	303.00
Brick	103	4,092	6,804.30
Gasoline	21	538	2,199.95
H. H. Goods.	5	42	98.53
Sewer Pipe.	4	57	91.50
Wagons	3	28	158.10
Rails	1	11	D. H.
Molasses	1	15	37.19
Chemicals	17	621	2,252.12
Other Metals.	3	98	296.85
Textiles	2	21	82.99
Vegetable Oils.	1	17	53.30
Total	925	28,353	68,068.39
Merchandise L. C. L. ....	....	1,040	6,261.65
Total	2,123	71,316	\$119,597.83

Dayton, Texas, December 15, 1922.

(Signed) J. J. Balderach, Vice President & Treasurer.

[fol. 81]

EXHIBIT "B"

Dayton-Goose Creek Railway Company

*Statement of Intrastate Freight Traffic Movement and Revenue
Thereon Period March 1, 1920, to December 31, 1920, Inclusive*

Prods. of Agri.:	No. car loads, 1920	Tons, 1920	Revenue
Rice	121	3,719	5,640.21
Hay	59	653	1,483.19
Mill Prods.	97	1,943	3,784.07
Oats	65	2,338	2,418.50
Flour and Meal.	7	142	352.24
Fresh Fruits.	13	167	326.98
Cotton Seed. ....	....	....	*5.50
Corn	4	89	161.46
Potatoes	1	13	21.84
Total	357	9,064	14,182.99

	No. car loads, 1920	Tons, 1920	Revenue
Prods. of Animals:			
Cattle	28	323	432.91
Hogs	1	8	25.50
Total	29	331	458.41
Prods. of Mines:			
Gravel	791	36,103	16,150.96
Coal	2	55	87.71
Asphalt	1	37	33.89
Crude Oil	586	12,462	24,235.22
Total	1,380	48,657	40,507.78
Prods. of Forests:			
Lumber	457	13,239	25,750.81
Ties	16	308	417.00
Wood	108	3,187	2,644.73
Total	580	16,734	28,812.54
Manufactures:			
Pipe	292	7,768	25,264.52
Mchy	27	531	1,869.33
Other Mfgs.	157	3,606	8,188.62
Cement	77	2,872	4,481.93
Brick	73	2,959	2,832.15
Gasoline	475	13,617	32,880.63
H. H. Goods	28	250	462.93
Ice	177	3,640	5,665.31
Sewer Pipe	34	505	393.87
Wagons	3	34	202.01
Canned Goods	1	6	29.04
Lime	6	168	190.80
Molasses	2	25	87.82
Chemicals	19	873	1,441.13
Furniture	1	12	56.88
Total	1,372	36,866	84,046.97
Merchandise L. C. L.		1,819	10,280.63
Total	3,718	113,471	\$176,289.32

Dayton, Texas, December 15, 1923.

(Sgd.) J. J. Balderach, Vice President and Treasurer.

[fol. 82]

EXHIBIT "C"

Dayton-Goose Creek Railway Company

*Statement of Interstate Freight Traffic Movement and Revenue
Thereon Period January 1, 1921, to December 31, 1921, Inclusive*

	No. car loads, 1921	Tons, 1921	Revenue
Prods. of Agri.:			
Hay	17	197	427.45
Mill Prod.	6	138	398.41
Oats	6	169	366.72
Total	29	504	1,192.58
Prods. of Animals:			
Oth. Prod. of Animals.	2	33	180.20
Prods. of Mines:			
Crude Oil.	486	18,361	18,742.24
Gravel	26	682	2,184.76
Asphalt	2	71	171.11
Coal	8	353	204.62
Total	532	19,467	21,302.73
Prods. of Forests:			
Lumber	58	1,899	3,333.78
Wood	5	127	389.41
Ties	1	33	80.04
Total	64	2,059	3,803.23
Manufactures:			
Gasoline	635	19,222	25,346.06
Lub. Oil.	657	10,936	24,537.28
H. H. Goods.	3	28	104.03
Other Mfgs.	172	3,033	9,513.47
Pipe	173	6,685	12,393.42
Mchy	13	264	898.75
Chemicals	47	1,979	4,644.53
Cement	2	40	45.42
Brick .....	.....	.....	*.06
Rails	2	51	84.33
Sewer Pipe.	2	28	56.33
Other Metal.	1	6	32.91
Lead	1	22	96.30
Total	1,708	49,294	77,752.79

	No. car loads, 1921	Tons, 1921	Revenue
Merchandise L. C. L. ....	.....	897	5,008.77
Total	2,335	72,254	109,190.30

Dayton, Texas, December 15, 1922.

(Signed) J. J. Balderach, Vice President & Treasurer.

[fol. 83]

*Statement of Intrastate Freight Traffic Movement and Revenue
Thereon Period January 1, 1921, to December 31, 1921, Inclusive*

	No. car loads, 1921	Tons, 1921	Revenue
Prods. of Agri.:			
Rice	111	3,364	5,744.03
Hay	48	566	1,360.65
Mill Prods.	131	2,532	5,947.61
Flour & Meal.	7	160	394.61
Fresh Fruits.	6	85	138.74
Cotton Seed.	5	88	207.64
Oats	18	392	715.36
	326	7,187	14,508.54
Prods. of Animals:			
Cattle	54	498	650.74
Horses	1	12	25.30
Hogs	2	17	38.63
Total	57	527	714.67
Prods. of Mines:			
Crude Oil.	1,448	51,703	68,324.61
Gravel	213	10,069	6,024.33
Asphalt	2	38	131.16
Coal .....	.....	.....	*20.58
Total	1,663	61,810	74,459.52
Prods. of Forests:			
Lumber	519	10,997	22,125.65
Wood	14	460	349.54
Ties	20	563	1,171.60
	563	12,020	23,647.09

Manufactures:	No. car loads, 1921	Tons, 1921	Revenue
Gasoline	1,120	30,359	69,346.90
Lub. Oil	101	1,795	4,539.99
Fuel Oil	10	387	501.89
Kerosene	4	140	163.15
H. H. Goods	12	120	299.67
Other Mfgs.	139	1,900	6,695.26
Ice	92	1,910	2,882.33
Pipe	126	3,775	12,748.94
Mchy	42	905	4,226.46
Chemicals	111	5,237	8,562.21
Cement	52	2,228	4,000.13
Brick	49	1,795	2,196.27
Wagons	2	24	112.56
Rails	5	175	360.85
Sewer Pipe	6	85	177.43
Lime .....	....	.....	12.84
Canned Goods .....	....	.....	27.62
Molasses	1	18	71.09
Total	1,872	50,853	116,925.49
Merchandise L. C. L. ....	....	1,325	8,606.19
Total	4,471	133,722	238,861.50

Dayton, Texas, December 15, 1922.

(Signed) J. J. Balderach, Vice President & Treasurer.

[fol. 84] EVIDENCE: COMPLAINANT'S EXHIBIT No. 5

"My name is J. A. Brown. I reside in the City of Houston, Harris County, Texas. At the present time I am the General Freight Agent of Gulf Coast Lines, a system of railroads comprising New Orleans, Texas & Mexico Railway Company, which operates a line of railroad from the City of New Orleans, La., to the Texas-Louisiana state line, at a connection with the rails of The Beaumont, Sour Lake & Western Railway Company at the Sabine River; The Beaumont, Sour Lake & Western Railway Company, which operates a line of railroad from the aforesaid connection with the rails of New Orleans, Texas & Mexico Railway Company at the Sabine River, to the City of Houston, Harris County, Texas; The St. Louis, Brownsville & Mexico Railway Company, which operates a line of railroad from the said City of Houston to the City of Brownsville, Cameron County, Texas, on the Mexican border, where by means of the tracks and bridge of the Brownsville & Matamoros Bridge Company, it connects

with the rails of the National Railways of Mexico; the Orange & Northwestern Railroad Company, which operates a line of railroad from the City of Orange, Orange County, Texas, to the City of Newton, Newton County, Texas, crossing the line of The Beaumont, Sour Lake & Western Railway Company at Mauriceville, Texas.

These railroads were formerly parts of the so-called Frisco System and ever since a date prior to the year 1910 have been operated under a common management and control as parts of the same system. Except for a short time during the period of Federal Control of Railroads, my connection with these lines as General Freight Agent has been continuous for more than ten years, during all of which time I have been the head of the Traffic Department of these lines.

[fol. 85] When the St. Louis-San Francisco Railroad Company went into the hands of receivers in 1913, the lines above mentioned also went into the hands of a receiver, but were reorganized, effective March 1, 1916, into a separate and independent system of railroads, and since that time have been known commercially as the Gulf Coast Lines. The system also includes some other small lines which it is not deemed necessary to mention. The operated mileage of the St. Louis, -Brownsville & Mexico Railway Company, which lies wholly within the State of Texas, was on December 31, 1921, 544.99 miles. The operated mileage of The Beaumont, Sour Lake & Western Railway Company, which lies wholly within the State of Texas, was on said date 112.33 miles, and the operated mileage of The Orange & Northwestern Railroad Company, which also lies wholly within the State of Texas, was on said date 61.55 miles. For the ten years immediately preceding the date last mentioned, no substantial change occurred in the operating mileage above mentioned.

On account of my connection with the Traffic Department of the lines mentioned above, I have for more than ten years last past been engaged in studying and participating in rate adjustments into and out of the State of Texas and intrastate within the state of Texas. During the past year or eighteen months the owners of the Gulf Coast Lines began negotiations with the owner of the stock of the Dayton-Goose Creek Railway Company looking to the purchase of all of the capital stock of Dayton-Goose Creek Railway Company by New Orleans, Texas & Mexico Railway Company, one of the companies composing the Gulf Coast Lines, and at the request of the [fol. 86] Executive Department of New Orleans, Texas & Mexico Railway Company I made an investigation of the traffic and rate situation of Dayton-Goose Creek Railway Company in order to ascertain as nearly as I could, for the benefit of the New Orleans, Texas & Mexico Railway Company, its officers and directors, the status of the traffic affairs of Dayton-Goose Creek Railway Company, its possibilities from a traffic standpoint, and its potential earning capacity; and by reason of having made this investigation and of my connection during the past ten years and more with rate adjustments generally within and into and from the State of Texas, it is my opinion that I am at least reasonably well acquainted with the traffic and rate situation of Dayton-Goose Creek Railway Company.

The railway operating revenues of Dayton-Goose Creek Railway

Company from March 1, 1920, to December 31, 1921, were, of course, derived from services and transportation rendered and conducted either wholly intrastate within the State of Texas or interstate and foreign between points within the State of Texas and points without the State of Texas.

So far as the Railway operating revenues of said company were derived from intrastate transportation conducted wholly within the State of Texas, they were based upon rates established, promulgated or approved either by the Railroad Commission of Texas or by the Interstate Commerce Commission, as evidenced by the following statement. Prior to the orders of the Interstate Commerce Commission in the case of Railroad Commission of Louisiana vs. Aransas Harbor Terminal Railway Company, et al., 48 I. C. C., 312, and Railroad Commission of Louisiana vs. St. Louis-Southwestern Railway Company, et al., 23 I. C. C., 31, 34 I. C. C., 472, commonly referred to as the Shreveport Case, the order in connection with the [fol. 87] report published in 48 I. C. C., 321, being dated January 22, 1918, all of the transportation conducted intrastate in the State of Texas was conducted at rates established and promulgated by the Railroad Commission of Texas. In its said order of January 22, 1918, Docket No. 8418, the Interstate Commerce Commission prescribed or approved rates upon all classes and commodities, except a few commodities to be below mentioned, for application to intrastate traffic by railroad within the State of Texas. Rates upon the few commodities excepted from the order of the Interstate Commerce Commission in said proceeding has been agreed upon between the complainant, the carriers, representative shippers and the Railroad Commission of Texas and were promulgated by an order or orders of the Railroad Commission of Texas, and were for that reason excepted from the order of the Interstate Commerce Commission. Effective June 25, 1918, a general increase in rates, including all rates applicable to intrastate traffic in Texas, became effective by order of the Director General of Railroads of the United States, averaging approximately 25%, and later the intrastate rates within the State of Texas were further increased by approximately 35% under the order of the Interstate Commerce Commission in Ex Parte 74, Increased Rates 1920, 58 I. C. C., 220, the order in the proceeding last mentioned being dated July 29, 1920, and took effect on August 26, 1920.

Application was promptly made after the decision of the Interstate Commerce Commission in the proceeding last mentioned to the Railroad Commission of Texas for an express order authorizing the increase of the intrastate rates within the State of Texas to the level approved and directed by the Interstate Commerce Commission in said proceeding. This order was refused by the Railroad Commission of Texas which authorized an increase of 33 $\frac{1}{3}$ % instead of the 35% authorized by the Interstate Commerce Commission. The [fol. 88] Texas carriers thereupon increased the classes and commodities involved in the above mentioned Shreveport case 35% but only advanced the rates on those commodities which had been excluded from the order in the Shreveport case 33 $\frac{1}{3}$ %. All of the

foregoing has reference to freight rates. Up to the time of the decision by the Interstate Commerce Commission in Ex Parte 74, the passenger rates in Texas had, except in a few instances relating to party and excursion rates and the like, been 3¢ per mile as fixed by Article 6618 of the Revised Statutes of Texas of 1911. The said order of the Interstate Commerce Commission authorized and approved an increase of passenger rates in the State of Texas to 3.6¢ per mile and also authorized a surcharge, to be collected from passengers riding in sleeping, parlor or chair cars equal to 50% of the sleeping car fare, parlor car fare or chair car fare. The application of the Texas carriers to the Railroad Commission of Texas, next above referred to, also requested authority to increase the passenger rates to the levels just mentioned and this part of the application was also refused by the Railroad Commission of Texas.

Thereupon the principal Texas carriers instituted a proceeding before the Interstate Commerce Commission, No. 11764 upon the Docket of said Commission, charging that the failure of the Railroad Commission of Texas to authorize the same increases in intrastate rates in Texas as had been authorized by the Interstate Commerce Commission in Ex Parte 74, and the resulting discrepancy in the rates intrastate as compared to interstate, constituted a discrimination against interstate commerce which the Interstate Commerce Commission was requested to order removed. On February 12, 1921, the Interstate Commerce Commission issued its report and order in said proceeding, 60 I. C. C., 421, finding that the discrimination charged did in fact exist and directing its removal and prescribing the same rates, fares and charges for application to intrastate traffic and travel in Texas as had been authorized for the group in which said state is located in Ex Parte 74, and the rates, fares and charges so prescribed, except in some minor and negligible instances, where expressly authorized by the Interstate Commerce Commission, continued to be charged upon intrastate freight and passenger traffic in Texas during the remainder of the year 1921. The revenue derived by Dayton-Goose Creek Railway Company between March 1, 1920, and December 31, 1921, from interstate and foreign traffic was derived and earned on account of the transportation of traffic which, for the purposes of this affidavit, may be divided into two classes: (a) traffic upon which rates had been prescribed or approved by express orders of the Interstate Commerce Commission. All interstate traffic covered by the orders of the Interstate Commerce Commission in the Shreveport Case cited above, and all interstate traffic upon which the Interstate Commerce Commission had fixed rates in specific complaints are instances of this class of traffic. (b) Traffic which moved upon rates, the basis of which have been in existence for many years without substantial and successful attack. The basis of the greater part of these rates had been in effect to and from points in Texas for many years and in my opinion these rates, taken as a whole, were reasonable. This opinion of mine is based not only upon my traffic experience in connection with those rates but also upon the presumption that rates which have been in existence during a long period of time are presumptively reasonable.

[fol. 90] See Galble-Robinson Commission Co. vs. St. L.-S. F. R. R. Co., et al., 19 I. C. C., 114, Commercial Club of Omaha vs. Southern Pacific Company, et al., 20 I. C. C., 631.

My opinion therefore is that aside from such errors, if any, as may have arisen in the ordinary course of business, the gross railway operating revenues of Dayton-Goose Creek Railway Company for the period commencing March 1, 1920, and ending December 31, 1921, arose from the assessment and collection of rates, fares and charges, which, on the whole, were just, fair and reasonable and were not unlawful, unreasonable or excessive.

OFFERS IN EVIDENCE

The Interstate Commerce Commission offered in evidence the following matters, viz:

(1) Certified copy of excerpts from Special Instructions contained in the Commission's "Classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914."

(2) Certified copy of excerpts from General Instructions contained in the Commission's "Classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914."

(3) Certified copy of excerpts from order of the Commission, dated April 26, 1921, and effective on and after January 1, 1921, in a proceeding, entitled, "In the matter of a uniform system of accounts to be kept by steam roads."

(4) Order, Ex parte 74, July 29, 1920 (58 I. C. C. 220).

Copies of the foregoing accompany this statement as a part hereof. [fol. 91] And Complainant prays that the foregoing statement of the evidence in this cause be approved and made a part of the record herein on appeal.

Jno. C. Townes, Jr., Frank Andrews, Robert H. Kelley, Solicitors for Complainant and Appellant.

No objection having been made to the foregoing statement of the evidence, the same is hereby approved, on this the 6th day of April, 1923.

R. W. Walker, Circuit Judge. Alex C. King, Circuit Judge.
Rufus E. Foster, District Judge.

The foregoing statement of the evidence is hereby approved and agreed to.

Blackburn Esterline, Assistant to Solicitor General for the United States of America; Randolph Bryant, District Attorney; P. J. Farrell, Chief Counsel Interstate Commerce Commission, for the Commission.

[fol. 92]

EVIDENCE: ORDER

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 29th Day of July, A. D. 1920.

Ex Parte 74

In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates.

It appearing, That by its report entered in the above-entitled proceeding, which is hereby referred to and made a part hereof, the Commission authorized certain increases in the rates, fares, and charges of railroads within the continental United States;

It is ordered, That all outstanding unexpired orders of the Commission, whether or not effective upon the date of this order, authorizing or prescribing rates, fares, and charges which have or have not been published at the date of this order, and all outstanding suspension orders, be, and they are hereby, modified to the extent necessary to permit the increases herein authorized to be applied to the rates, fares, and charges authorized or prescribed in or maintained or held by virtue of said outstanding orders; but that in all other respects said orders shall remain in full force and effect.

It is further ordered, That all tariffs or supplements changing rates now maintained or held by virtue of outstanding orders of this Commission shall bear on their title-page the following:

Rates shown in this supplement (or tariffs supplemented hereby) published under authority of outstanding orders of the Interstate Commerce Commission are increased herein under authority of order of the Interstate Commerce Commission docket No. 74 (Ex Parte), dated July 29, 1920.

[fol. 93] And it is further ordered, That a copy of this order be served on each carrier party to said orders and that a copy thereof be inserted in the docket in each such proceeding.

By the Commission.

George B. McGinty, Secretary. (Seal)

(1) Certified copy of excerpts from Special Instructions contained in the Commission's "classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914, as follows, viz:

Accounts for Operating Revenues.—The accounts provided for operating revenues are designed to show amounts of money which a carrier becomes entitled to receive from transportation and from operations incident thereto.

Credits to the revenue accounts shall as nearly as practicable be upon the basis of accruals of revenue.

No charge shall be made against the accounts of this classification for amounts representing tariff charges which for any cause are uncollected, the service for which the charge is made having been prop-

erly performed and individuals or companies being liable for the charges. (Id. 13.)

Accounts for Operating Expenses.—The accounts prescribed for operating expenses are designed to show expenses of furnishing transportation service, including the expenses of maintaining the plant used in the service. The accounting shall be as nearly as practicable upon the basis of accruals; however, the option is allowed the carrier of omitting charges to the accounts provided for the depreciation of fixed improvements and of including the depreciation (ledger value less salvage) of such property in the appropriate repair accounts at the time the property is converted or retired for replacement. (Id. 31.)

[fol. 94] **Balances in Operating Reserves.**—If, at the end of a fiscal year, balances remain in operating reserves, the carrier shall indicate in detail in a formal report to the Commission the amounts therein, and the conditions causing the carrying forward of such balances, except as to balances applicable to personal injury or loss and damage liability, for which balances the carrier shall preserve in its files the details upon which such estimates were based. Separate records shall be kept of the operating reserve accounts for each year.

Interpretation of Item Lists.—Lists of "items," "details," etc., have been given as a part of this classification for the purpose of clearly indicating the application of the accounting rules in specific cases. The lists in every case are to be considered as merely representative and not as excluding from any account analogous items which happen to be omitted from the list appended. * * * (Id. 38.)

(2) Certified copy of excerpts from General Instructions contained in the Commission's "classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914, as follows, viz:

"Unaudited Items Affecting Operating Accounts.—When for any cause the amount of any item affecting operating revenues or operating expenses can not be accurately determined in time for inclusion in the accounts of the month in which the transaction occurs, the amount of the item shall be estimated and in such form charged or credited to operating accounts and credited to balance-sheet account No. 78, "Other unadjusted credits," or charged to balance-sheet account No. 727, "Other unadjusted debits," as may be appropriate, the necessary adjustments being made later when the item is audited. The carrier is not required to anticipate minor items which would not appreciably affect the operating accounts. (Id. 10.)

(3) Certified copy of excerpts from order of the Commission, dated April 26, 1921, and effective on and after January 1, 1921, in a proceeding entitled, "in the matter of a uniform system of accounts to be kept by steam roads," as follows:

* * * If, on account of claims for personal injury or loss and damage being unsettled at the close of the year, the accounts for such expenses are not adjusted, the balances carried forward in the operat-

ing reserve account shall be analyzed as provided for in section 20 of these instructions.

Charges for stationery and printing and for advertising for a fiscal year shall be adjusted to the actual expenses.

[fol. 95] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

OPINION OF THE COURT—Filed Mar. 16, 1923

On Application of Complainant for Preliminary Injunction and on
Motion of the United States to Dismiss the Petition

Jno. C. Townes, Jr., Frank Andrews, Robert H. Kelley, Andres, Streetman, Logue & Mobley, for Complainant.

Blackburn Esterline, Assistant to the Solicitor General, Randolph Bryant, United States Attorney, and S. D. Bennett, Assistant United States Attorney, for Defendants.

Before Walker and King, Circuit Judges, and Foster, District Judge

By the COURT:

Dayton-Goose Creek Railway Company, a corporation organized and existing under the laws of Texas, filed its bill in equity against the United States of America, the Interstate Commerce Commission, (herein called the Commission), and the United States District Attorney for the Eastern District of Texas, the District in which complainant has its principal office and principal operating [fol. 96] office. The bill contained allegations to the following effect: Complainant is now and has been since a date long prior to the 29th day of February, 1920, a common carrier by railroad engaged in the transportation of freight and passengers, for hire, in intrastate, interstate and foreign commerce, and as such is now and was at all times mentioned in the bill subject to the Act of Congress entitled "An Act to Regulate Commerce, and for other purposes," approved February 4, 1887, and Acts amendatory thereof and supplementary thereto, and also subject to the lawful provisions of the Transportation Act of 1920, and to all other lawful Acts of Congress regulating railroads engaged in interstate and foreign commerce. Pursuant to orders of the Commission, complainant, under protest, has filed a report containing a statement of investment in road and equipment, of net railway operating income, by months, for the year ended December 31, 1920, and of excess railway operating income for the ten months of that year from March 1, 1920, to December 31, 1920. It filed a similar report covering the entire year 1921. Each of those reports showed that, for the period it

covered, complainant had a net railway operating income in excess of 6 per cent of the value of the railway property held for and used by it in the service of transportation, and stated the amount of such excess. The Commission has, by orders set out, required one-half of such excess to be placed by complainant in a reserve fund, and demanded of the complainant payment by it of one-half of such excess, and has fixed a stated date by which such demand is to be complied with. If such demands are not complied with within the time fixed, the Commission will undertake to prosecute complainant, its officers and directors, and to subject them to fines and penalties for failing to comply therewith. The bill contains a prayer [fol. 97] for a temporary injunction staying and suspending said orders of the Commission so far as they relate to the payment of money by complainant to the Commission and into a reserve fund of complainant. The case was submitted on complainant's application for a temporary injunction and on motion of the United States to dismiss the bill.

The Transportation Act of 1920 was passed by the Congress to accomplish a number of purposes.

The railroads of the country for more than two years had been taken out of the hands of their owners and operated by the Federal Government, as a single system.

This operation had ignored the competitive system formerly existing between lines of Railway and had routed the business solely with a view to its expeditious handling to meet the emergencies arising from a state of war. Business which under the former system would have been solicited and moved over certain lines, was under government control frequently routed over a formerly competitive line.

The Government was, on March 1st, 1920, restoring the operation of the railroads to their owners to re-establish their several businesses and resume their relations as carriers, by land, of the commerce of the country.

In so doing, it recognized that the years of Government operation had altered the practical relation of the railroads to the public and to governmental regulations. The Congress determined that its powers to regulate interstate commerce must now be exercised to a wider extent than before, in order that an adequate system of interstate transportation should be preserved for the commerce of the country. To that end, it greatly enlarged the powers of the Interstate Commerce Commission. It empowered it to group the railroads of the country, to prescribe rates adequate to a fair remuneration of each of the members of such groups and to order proper divisions of such joint rates. It could also prescribe minimum as [fol. 98] well as maximum rates. It could exercise such control over intrastate rates as would prevent discriminations against interstate or foreign commerce. It could control the issuance of railroad securities, the building of additional roads and the abandonment of existing lines, so far as they were interstate carriers. It could plan and recommend the consolidation of all the railroads of

the country into a number of interstate systems, not being necessarily restrained by existing competition.

The scope of this Act and the departure therein from the former limitations on the regulation of interstate commerce have been the subject of recent consideration by the Supreme Court of the United States in the case of *The Akron, Canton and Youngstown Railway Company et al. v. The United States of America et al.*, (*The New England Divisions Case*), opinion rendered February 19, 1923.

In this opinion it is said:

"Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties were imposed." * * *

"The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit [fcl. 99] to what the traffic would bear. A five per cent increase had been granted in 1914, the *Five Per Cent Case*, 31 I. C. C. 351; 32 I. C. C. 325; fifteen per cent in 1917, the *Fifteen Per Cent Case*, 45 I. C. C. 303; twenty-five per cent in 1918, *General Order of Director General, No. 28*. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized."

Among other provisions the Act provided substantially that all railroads should hold one-half of the excess of net earnings over 6 per cent, net on the valuation of its property as fixed by the Commission after paying expenses, as trustee, for, and pay the same to, the United States. These sums were to be collected by the Interstate Commerce Commission and used by it "in furtherance of the public interest in railway transportation, either by making loans to carriers to meet expenditures for capital account or to refund ma-

turing securities originally used for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers"; sums to collected and accretions thereof to constitute a revolving fund to be used for the purposes stated. Transportation Act, 1920, Sec. 422, 41 Stat. 456, 488.

This provision is attacked as unconstitutional, on the ground that it takes the property of the carrier from whom such per cent. of excess earning is collected without compensation, and denies to it due process of law, and also on the ground that the requirement, so far as it embraced any earning from intrastate rates, was beyond the power of Congress.

It is well settled that no Act of Congress will be declared unconstitutional unless the question is free from any reasonable doubt. *Nichol v. Ames*, 173 U. S. 509, 515.

It would not be seriously questioned that in returning the railroads to their owners, after their use during the World War, the [fol. 100] United States could have made an appropriation creating a revolving fund, and prescribed for its use in aiding railroads as is now provided in the Transportation Act of 1920.

It would be a reasonable exercise of its right to thus partly compensate for the use of their property, used in the manner above recited, during the period of government operation.

Furthermore, by the Act of June 8, 1872, all of the railroads of the country are declared to be post roads. Rev. Sts. Sec. 3964, (U. S. Comp. Sts. Sec. 7456).

By the Constitution the Congress is expressly empowered "to establish Post offices and post roads." Const., Art. I, Sec. 8, cl. 7.

Under this and other like powers the Congress has aided the construction of the transcontinental lines.

These powers would authorize aid to be extended in the manner prescribed in the Transportation Act to keep up and make efficient such railroads as needed the same.

The only question left, therefore, is as to the Government's right to raise this fund, so to be used, by requiring the railroads to pay to it one-half of the excess earned by them over certain percentages. It will be noted that no road earning any excess is relieved from this assessment.

The power of Congress to regulate interstate and foreign commerce includes power to adopt measures to aid and encourage such commerce. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204; *Mobile County v. Kimball*, 102 U. S. 691, 696. To promote those objects it may exercise its power of taxation. *License Tax Cases*, 5 Wal. 462, 470. It is not doubted that funds raised by legal taxes or exactions may be devoted to the purposes for which the revolving fund provided for is required to be used.

[fol. 101] While the exaction in question is not denominated a tax it is in effect an excise tax levied on all carriers subject to the Transportation Act, payable from surplus earnings. In other words, the carriers are exempt from this tax who do not earn a certain per cent. on their invested capital, and all are exempt up to this percent-

age of net earnings. All whose earnings exceed that amount are required to pay the same percentage of the excess to provide a given fund. In speaking of the raising of revenues for weaker lines, the Supreme Court, in *The New England Divisions Case*, says:

"In other words, the additional revenues needed were raised partly by a direct, partly by an indirect tax."

We see no reason why the United States cannot measure this tax by the excess profit realized over a specified percentage.

It is the nature of the demand and not its name as given in the statute which determines if it is in truth a tax. *Helwig v. United States*, 188 U. S. 605, 613; *Fontenot v. Accardo*, 278 Fed. 871, 874.

That this levy is made on excess profits derived from intrastate as well as from interstate traffic is not a sound objection. Regarded as a tax levied by the Government it can be measured by the entire profit of the railway as well as by a percentage on that part of the surplus net income derived from interstate business.

Where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the Nation, the measure of the tax may be the income from the property or business of the party taxed, although a part of such income is derived from property or business in itself not taxable by the Nation. *Flint v. Stone Tracy Co.*, 220 U. S. 108, 163.

[fol. 102] The tax would be an excise tax on the business of the class of carriers named. *Railroad Co. v. Collector*, 100 U. S. 595, 598.

So regarded, the requirement that this fund be held in trust for, and be paid to, the United States, is, as to the percentage of sums collected in excess of the percentage to be retained by the railway company, not the taking of its property without compensation or due process of law.

Indeed, this part of the income of the road is not collected by it absolutely as its property. It is earned and collected under the terms of the Transportation Act to be held in trust for, and to be paid to, the United States.

It is not contended that the part of its net revenue from its railway operations which, under the provision in question, complainant is permitted to retain is less than a fair and remunerative return on its investment in road and equipment. So far as complainant is concerned, the practical result is the same as it would have been if the rates and charges for complainant's transportation services had been so fixed as to enable it to receive for such services a compensation no greater than the amount it is permitted to retain after deducting the sums required by the Transportation Act.

But it is insisted that this provision leaves open the question that shippers may bring suits against a carrier, who makes a large income under the rates permitted, for overcharges, and that the carrier will have then disposed of this part of the overcharge to the Government.

In effect, the suggestion is that the returns made in the manner prescribed do not show complainant's real net railway operating in-

come for the periods covered, as deductions to be made from gross income do not include amounts which, after the dates of the returns, [fol. 103] complainant may be required to pay in discharging claims which accrued during such periods, which amounts may be unascertainable until afterwards.

We do not understand that the validity of a tax or exaction based upon yearly income or an excess thereof over a stated per cent., is dependent upon it being permissible, in ascertaining such income of such excess, to deduct from the amount of gross income received during the year both what is paid during the year in discharging liabilities previously incurred and also an amount to cover liabilities incurred during the year which remain unliquidated at the end of the year and when the return is made. Where the right to claim an overcharge exists, the repayment of such overcharge would be a charge against the gross income of the year when paid, as an expense of that year, just as payments made in the year 1922 on judgments rendered against a carrier are reckoned as an expense of that year notwithstanding the claim originated in an earlier year. It is not sufficiently probable that there will be such differences in the income of succeeding years as to make it likely that this method of dealing with this subject would not average itself. What are proper deductions to be made from gross income in ascertaining net income for a given period is a matter for legislative determination.

It may well be questioned whether a claim for overcharge would be sustained where a rate approved by the Commission was charged.

The carriers are not required to charge these rates; they are only permitted so to do, and it hardly lies in the mouth of a carrier to [fol. 104] suggest that the rates so charged by it will be considered unreasonable, where fixed by it within a maximum allowed by the Commission, especially where the excess over a limited per cent. is paid to the Government under a statute so requiring, or appropriated in the manner prescribed by the Transportation Act.

It is to be presumed that the rates permitted to be charged by the railroads under this Act are not unjust and unreasonable as to the shippers, where authorized by the Commission which is vested with such extensive powers as to seeing that such rates are just and reasonable and non-discriminatory as to the shippers.

It may be also questioned whether the carrier could be charged, in any event, with the percentage which had been paid therefrom to the United States under the terms of this Act.

But if the sums paid to the Government are to be regarded as overcharges paid by shippers and as money to which they are entitled, this does not give to the carrier any right to retain this sum, or to an injunction to restrain the Government from collecting the sum which the carrier is only allowed to collect as a trustee for the United States, or for special purposes prescribed by statute.

The Transportation Act provides that this fifty per cent. of the excess over 6 per cent is not collected, or held, by the carrier for its own account, but as trustee for the United States, to whom it is to be paid.

Clearly, the carrier is not entitled to retain it in the absence of any demand on it for its repayment by the persons from whom collected.

The utmost of its right, in that event, would be to interplead the claimants. It would have no right to retain the fund as its own, which it now proposes to do. It does not concede any liability to refund this, or any other fund, to the shipper.

[fol. 105] If the carrier has no right to the fund, it cannot raise the question of the constitutionality of this part of the Transportation Act. *Hatch v. Reardon*, 204 U. S. 152, 160; *Turpin v. Lemon*, 187 U. S. 51, 60.

As to the requirement that the rail carriers subject to the Transportation Act shall devote the remaining fifty per cent. excess over said 6 per cent. to certain purposes, this does not take away any part of said fund from the carrier earning it. It only requires the carrier to hold and use it for certain of its corporate purposes.

We think that this is within the powers of the Congress to order. *Wilson v. New, Receiver*, 243 U. S. 332, 347.

It is not perceived what right the complainant has, in this situation, to decline to recognize its liability to the United States and make payment to the Interstate Commerce Commission, as its designated agent.

The injunction applied for will be denied and the bill dismissed.

[fol. 106] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

ORDER DENYING INJUNCTION AND DISMISSING BILL OF COMPLAINT—
Filed March 16, 1923

On Application of Complainant for Preliminary Injunction and on
Motion of the United States to Dismiss the Petition

This cause coming on to be heard before the undersigned, the several parties thereto being present by their respective counsel, was submitted on Complainant's application for an interlocutory injunction as prayed for in its bill of complaint, and on motion of the defendant the United States of America that said bill of complaint be dismissed: thereupon, upon consideration, it is ordered, adjudged and decreed that said application for an interlocutory injunction be, and the same is, denied: it is further ordered, adjudged and decreed that said motion of the defendant the United States of America be, and the same is, granted, and that said bill of complaint be, and the same is, dismissed; it is further ordered, adjudged and decreed that the defendants have and recover of the Complainant the costs

[fol. 107] of the suit, to be taxed by the Clerk, for which execution may issue.

Dated March 15th, 1923.

(Signed) R. W. Walker, United States Circuit Judge.

(Signed) Alex. C. King, United States Circuit Judge.

(Signed) Rufus E. Foster, United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN
DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

PETITION FOR APPEAL AND ORDER OF ALLOWANCE—Filed April 7,
1923

The above named Complainant, Dayton-Goose Creek Railway Company, considering itself aggrieved by the Order and Decree entered on the 15th day of March, 1923, in the above entitled proceeding, denying its application for an interlocutory injunction and dismissing its petition or bill of complaint, prays that an appeal may be allowed it from said Order and Decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors filed herewith, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

[fol. 108] (Signed) Jno. C. Townes, Jr., Frank Andrews, Robert H. Kelley, Solicitors for Complainant and Appellant, Dayton-Goose Creek Railway Company, Union National Bank Building, Houston, Texas.

April 6, 1923.

And now, to-wit, on the 6th day of April, 1923, the above named petitioner having filed its Assignment of Errors and otherwise conformed to the statutes and rules in such case made and provided, it is ordered that the appeal be allowed as prayed for in the foregoing petition, and made returnable on the 5th day of May, 1923; and the Clerk is directed to transmit forthwith to the Supreme Court of the United States a properly authenticated transcript of the record, papers and proceedings.

(Signed) R. W. Walker, Circuit Judge. Alex. C. King,
Circuit Judge. Rufus E. Foster, District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN
DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 7, 1923

[fol. 109]

Assignment of Errors

Comes now Dayton-Goose Creek Railway Company, Appellant, and makes and files this its Assignment of Errors, and says that the District Court of the United States for the Eastern District of Texas and the Judges thereof, in the opinion, order and decree herein, dated March 15, 1923, erred in the following and each of the following respects, to-wit:

1. In denying and refusing Appellant's application for an interlocutory injunction as prayed for in its petition herein.

2. In granting the motion of the Defendant, The United States of America, to dismiss Appellant's petition, and in dismissing the same.

3. In holding and deciding that, as to Appellant, the Act of Congress referred to in its petition herein, and the orders of the Interstate Commerce Commission entered in pursuance thereof and likewise referred to, are valid, constitutional and enforceable to the extent of that portion of Appellant's earnings thereby required to be paid to the Interstate Commerce Commission, as levying and assessing a tax.

4. In failing and refusing to hold and decide that said Section 15a and said orders of the Interstate Commerce Commission do not impose or assess a valid tax upon Appellant, for that if by said Section a tax was sought or intended to be assessed or imposed, the same is unconstitutional and void because in contravention of Section 7 of Article I of the Constitution of the United States, which provides that all bills for raising revenue shall originate in the House of Representatives but the Senate may propose or concur with amendments as on other bills.

[fol. 110] 5. In holding and deciding that the part of the income of Appellant required by said Act and by said orders to be paid to the Interstate Commerce Commission was not collected by Appellant absolutely as its property but that the same was earned and collected under the terms of the Transportation Act, 1920, in trust for the United States.

6. In holding and deciding that Appellant during either of the periods involved in this suit had any excessive income or earnings.

7. In holding and deciding that Appellant does not contend that the part of its net revenue from its railway operations, which, under the provisions in question, it is permitted to retain, is less than a fair and remunerative return on its investment in road and equipment.

8. In failing to give full and due consideration to the undisputed evidence to the effect that the value of Appellant's property held for and used in the service of transportation and therefore a fair return upon such value was and is far in excess of the amounts shown on the reports made by Appellant to the Interstate Commerce Commission for the respective periods involved.

9. In assuming, holding and deciding that in the several years during which Appellant may be obliged to pay liabilities which accrued during one or both of the periods involved in this suit, Appellant will have so-called excess earnings equal to or in excess of the amount of such payments and that Appellant will thereby secure the same full benefit of deducting such payment or payments as would be afforded by a provision for a refund by the Interstate Commerce Commission to Appellant, based upon actual payments of liabilities accrued in previous accounting periods during which so-called excess earnings existed.

[fol. 111] 10. In holding and deciding that what are proper deductions to be made from gross income for the ascertainment of net income for a given period is a matter for legislative rather than judicial determination.

11. In holding and deciding that it may well be questioned whether a claim for overcharge would be sustained where a rate approved by the Commission was charged.

12. In holding and deciding that it hardly lies in the mouth of Appellant to suggest that the rates charged by it will be considered unreasonable where fixed by it within a maximum allowed by the Interstate Commerce Commission.

13. In holding and deciding that Appellant could not be made liable by a shipper as for an overcharge for any moneys paid therefrom to the United States under the terms of the Interstate Commerce Act.

14. In holding and deciding that Appellant has no right to restrain the Government from collecting from it so-called excess earnings which accrued to it from the collection of excessive charges; for that the Interstate Commerce Act expressly imposes liability upon Appellant for all such amounts so collected by it, and the shipper damaged thereby has two years in which to file his claim against Appellant; and if Appellant may be compelled to pay to the Government any sum accruing from such collections and then later be required to respond to the claim of the shipper when the Interstate Commerce Commission has determined the fact and amount of damage, the result would be the payment of a part of such excess to the Government and a subsequent payment to the shipper, out of Appellant's own funds, of the full amount of the excess, resulting in a double recovery against Appellant, without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 112] 15. In holding and deciding that Appellant may be compelled to pay to the Interstate Commerce Commission a portion of the money accruing to it from the exaction of an unreasonable rate and then subsequently be compelled to pay to the shipper as reparation the amount to the extent of which the rate may be determined to have been unreasonable, being a part of the so-called excess earnings already paid to the said Commission.

16. In holding and deciding that as to Appellant the requirements of Section 15a of the Interstate Commerce Act, and said orders of the Interstate Commerce Commission entered in pursuance thereof, and each of them, with respect to the payment of money to the Interstate Commerce Commission by Appellant, are not, as to Appellant, null and void, because taking Appellant's private property without due process of law and without compensation, in contravention of the Fifth Amendment to the Constitution of the United States.

17. In holding and deciding that, as to Appellant, Section 15a of said Act, and said orders of the Interstate Commerce Commission, and each of them, requiring a certain portion of Appellant's earnings to be placed in a reserve fund, and prohibiting the use of such fund except for certain limited purposes, are not as to Appellant null and void, because taking Appellant's private property without due process of law and without compensation in contravention of the Fifth Amendment to the Constitution of the United States.

18. In failing and refusing to hold and decide that the property of Appellant and the entire income, revenues, earnings and profits arising therefrom are the private property of Appellant and that said Act and said orders, insofar as they attempt to require the payment of money by Appellant to the Interstate Commerce Commission, and into said reserve fund, are in violation of the Fifth Amendment [fol. 113] ment to the Constitution of the United States and therefore void as taking Appellant's private property without just compensation and without due process of law.

19. In failing and refusing to hold and decide that the provisions of said Act and said orders requiring a portion of Appellant's so-called excess earnings to be placed in a reserve fund to be drawn upon for specific and limited purposes only, deny to Appellant, without due process of law, and without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States, the liberty of ownership, control, use and disposition of its property.

20. In failing and refusing to hold and decide that said Act and said orders, and each of them, are void insofar as they undertake to regulate, limit or restrict the use or expenditure of so-called excess earnings by Appellant and to require Appellant to pay any portion thereof to the Interstate Commerce Commission, for any purpose, for that the enforcement thereof against Appellant would deny to it the equal protection of the law, subject it to unequal, arbitrary and discriminatory laws and thereby take its private property without due process of law and without compensation, in violation of the Fifth Amendment to the Constitution of the United States.

21. In failing and refusing to hold and decide that because Appellant owned and operated its properties long prior to the passage and approval of the Act containing said Section 15a, Appellant, under the Constitution of the United States, owned and possessed and has continuously since owned and possessed the right to collect and receive, and to retain and exercise, complete, untrammelled and unrestricted dominion and control over all revenues, earnings, receipts and income produced by said properties, and that all savings and [fol. 114] earnings resulting therefrom became instantly upon the accrual thereof and continued thereafter to be the private property of Appellant; and, insofar as said section and said orders undertake to compel Appellant to pay to said Commission for public use, or otherwise, or to retain and use only in certain contingencies, and then only for certain limited purposes, any part of such revenues, earnings, receipts and income, said Act and orders are null and void, for that if enforced against Appellant they would deprive Appellant of its liberty and of its private property without compensation and without due process of law, and deny to Appellant the equal protection of the law, in violation of the Fifth Amendment to the Constitution of the United States and of the fixed and vested rights, privileges and immunities which Appellant held and possessed under the Constitution of the United States at the time of the passage and approval of said Act.

22. In holding and deciding that the United States could for any purpose have any interest in or title to any amount or sum of money accruing to Appellant for transportation services not performed for the United States.

23. In failing and refusing to hold and decide that all earnings and income accruing to Appellant from traffic moved on just and reasonable rates is the private property of Appellant and can not be taken without due process of law nor without just compensation consistently with the Fifth Amendment to the Constitution of the United States.

24. In failing and refusing to hold and decide that said Act and orders are void as taking Appellant's private property without due process of law and without compensation in violation of the Fifth Amendment to the Constitution of the United States, in requiring [fol. 115] payment of so-called excess earnings to the Interstate Commerce Commission and into said reserve fund without making reasonable provision for the final determination of the actual net earnings for the year or period involved and for proper refund or adjustment based thereon.

25. In failing and refusing to hold and decide that said Section 15a is contradictory in its terms and incapable of enforcement, and that therefore said section, and the orders of the Interstate Commerce Commission predicated thereon, are null and void as to Appellant, because the enforcement thereof would take its private property without due process of law and without compensation, in violation of the Fifth Amendment to the Constitution of the United States.

26. In holding and deciding that as to Appellant the provisions of said Section 15a and said orders of the Interstate Commerce Commission requiring the payment of money by Appellant to said Commission and into a reserve fund are valid and enforceable and are not, as to Appellant, null and void as an unwarranted regulation of and burden upon, commerce conducted wholly within the State of Texas and the earnings and revenues therefrom, imposed by the Congress of the United States and the Interstate Commerce Commission in contravention of the Tenth Amendment to the Constitution of the United States.

27. In failing and refusing to hold and decide that as to Appellant said Section and said orders in effect impose a direct and unwarranted limitation upon the right of a corporation created under the laws of the State of Texas to earn money from the conduct of commerce carried on wholly within the State of Texas, and in no wise related to interstate or foreign commerce, and not subject to the [fol. 116] control of Congress or of the Interstate Commerce Commission and that said Act and orders are therefore void because in contravention of the Tenth Amendment to the Constitution of the United States.

28. In holding and deciding that the Congress and the Interstate Commerce Commission are not prohibited by the Tenth Amendment to the Constitution of the United States from requiring Appellant to pay to the Interstate Commerce Commission any part of any fund earned by Appellant in purely intrastate commerce within the State of Texas.

Wherefore, Appellant prays that the said order and decree dismissing its petition or bill of complaint and denying its application for an interlocutory injunction be reversed and set aside with directions that said application be granted, and for such other and further relief as may be appropriate.

(Signed) Jno. C. Townes, Jr., Frank Andrews, Robert H. Kelley, Solicitors for Appellant.

Read on Petition for Appeal April 6, 1923.

(Signed) R. W. Walker, Circuit Judge. Alex. C. King, Circuit Judge. Rufus E. Foster, District Judge.

[fol. 117] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

CITATION ON APPEAL—Filed April 7, 1923

UNITED STATES OF AMERICA, ss:

To the United States of America, the Interstate Commerce Commission, and Randolph Bryant, United States District Attorney for the Eastern District of Texas, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C., within thirty (30) days from the date hereof, pursuant to an appeal duly allowed and filed in the Clerk's office of the District Court of the United States for the Eastern District of Texas, at Beaumont, wherein Dayton-Goose Creek Railway Company is Appellant and The United States of America, The Interstate Commerce Commission and Randolph Bryant, United States District Attorney as aforesaid, are Respondents, to show cause, if any there be, why the order and decree in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard W. Walker and the Honorable Alexander C. King, United States Circuit Judges, and the Honorable Rufus E. Foster, United States District Judge, sitting in the District Court in pursuance of the Act of October 22, 1913, this 6th day of April, in the year of our Lord, One Thousand Nine Hundred Twenty-three.

(Signed) R. W. Walker, Circuit Judge. Alex. C. King, Circuit Judge. Rufus E. Foster, District Judge.

[fols. 118 & 119] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

APPEAL BOND FOR \$1,000.00—Filed April 7, 1923 (Approved:
Walker, King, & Foster, JJ.)

[Omitted in printing]

[fol. 120] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF TEXAS, AT BEAUMONT

[Title omitted]

PRÆCIPE—Filed April 7, 1923

To the Clerk of the District Court of the United States for the Eastern District of Texas; Honorable Blackburn Esterline, Assistant to Solicitor General; Honorable Patrick J. Farrell, Chief Counsel Interstate Commerce Commission, and Honorable Randolph Bryant, United States Attorney, Eastern District of Texas.

SIRS:

Please take notice that the Appellant designates the following as the portion of record in this cause to be incorporated into the transcript on its appeal:

1. Complainant's Petition filed December 6, 1922.
2. Answer of the Defendant, the Interstate Commerce Commission.
3. Amended motion to dismiss petition, filed by the defendants, the United States of America and Randolph Bryant, United States District Attorney.
4. Complainant's statement of the Evidence.
5. Opinion dated March 15, 1923.
6. Order and decree dated March 15, 1923.
7. Petition for appeal and order allowing the same.
8. Assignment of Errors.
9. Citation on Appeal.
10. Appeal Bond.
11. This Præcipe.

(Signed) Jno. C. Townes, Jr., Frank Andrews, Robert H. Kelley, Solicitors for Complainant and Appellant, Dayton-Goose Creek Railway Company, Union National Bank Building, Houston, Texas.

[fol. 121] April 6, 1923.

The defendants designate the following matters to be included in the foregoing præcipe and in the transcript, viz:

(1) Certified copy of excerpts from Special Instructions contained in the Commission's "classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914."

(2) Certified copy of excerpts from General Instructions contained in the Commission's "classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914."

(3) Certified copy of excerpts from order of the Commission, dated April 26, 1921, and effective on and after January 1, 1921, in a proceeding entitled, "in the matter of a uniform system of accounts to be kept by steam roads."

(4) Order, Ex parte 74, July 29, 1920 (58 I. C. C. 220).

It is stipulated and agreed by counsel for the parties that the foregoing enumerated documents shall constitute the record in this cause on appeal and service of the citation on appeal is hereby expressly waived.

(Signed) Frank Andrews, R. H. Kelley, Solicitors for Complainant. Blackburn Esterline, Assistant to the Solicitor General. P. J. Farrell, Solicitor for Interstate Commerce Commission.

[fols. 122-124] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, J. R. Blades, Clerk of the District Court of the United States for the Eastern District of Texas, in the Fifth Circuit, do hereby certify that the above and foregoing is a full, true and complete transcript of record, assignment of errors, and all proceedings in cause No. 262, in equity, wherein Dayton-Goose Creek Railway Company, is Complainant, and The United States of America, et al., are Defendants, as fully as the same remains on file and of record in my office at Beaumont, Texas; and that the same constitutes the original citation on appeal, annexed hereto.

Witness my hand officially and the seal of said Court, at Beaumont, in said District, this the 1st day of May, A. D., 1923.

J. R. Blades, Clerk U. S. District Court, E. D. T., By H. C. Blades, Chief Deputy. [Seal of United States District Court, Eastern District of Texas.]

Endorsed on cover: File No. 29,622. E. Texas D. C. U. S. Term No. 330. Dayton-Goose Creek Railway Company, appellant, vs. The United States of America, the Interstate Commerce Commission, and Randolph Bryant, United States district attorney for the eastern district of Texas. Filed May 15th, 1923. File No. 29,622.

U. S. Supreme Court,

FILED

OCT 18 1923

W. H. STANSBURY

CLERK

IN THE SUPREME COURT
OF

THE UNITED STATES

October Term, 1923

No. 330

DAYTON-GOOSE CREEK RAILWAY
COMPANY, *Appellant*,

VS.

THE UNITED STATES OF AMERICA
ET AL, *Appellees*.

Appeal from the District Court of the United States
for the Eastern District of Texas

BRIEF FOR APPELLANT

—By—

FRANK ANDREWS,

ROBERT H. KELLEY,

Solicitors for Appellant.

ANDREWS, STREETMAN, LOGAN & MORLEY,

Of Counsel.

U. S. FOUR PAPER COMPANY, INCORPORATED

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IN THE SUPREME COURT
OF

THE UNITED STATES

October Term, 1923

No. 330

DAYTON-GOOSE CREEK RAILWAY
COMPANY, *Appellant*,

VS.

THE UNITED STATES OF AMERICA
ET AL, *Appellees*.

Appeal from the District Court of the United States
for the Eastern District of Texas

BRIEF FOR APPELLANT

Statement of the Case.

This suit was instituted in the District Court of the United States for the Eastern District of Texas, at Beaumont, by a petition or bill of complaint filed December 6, 1922, by appellant, Dayton-Goose Creek Railway Company, as petitioner, against The United States of America, herein called the United States, the Interstate Commerce Commission, herein called the Commis-

sion, and Randolph Bryant, the United States District Attorney for the Eastern District of Texas (R. 2). The prayer of the petition was that the court (under Judicial Code, Sec. 207, 208, U. S. Comp. Stat. 1916, Sec. 993, 997, and the Act of October 22, 1913, U. S. Comp. Stat. Sec. 992, 998) vacate, annul and set aside two certain orders of the Interstate Commerce Commission relating to the so-called "*recapture of excess earnings*" of carriers by railroad under Section 15-a of the Interstate Commerce Act (Transportation Act 1920, Section 422); and that under the Commerce Court as well as under the general equity powers of said court, it enjoin and restrain the enforcement against appellant of the recapture and reserve fund provisions of said Section 15-a, and said orders of the Commission.

The Commission filed an answer on January 8, 1923 (R. 35), and on February 16, 1923, the United States and the Defendant Bryant filed an amended motion to dismiss the petition or bill of complaint. (R. 40.)

On these pleadings, and on the testimony below mentioned, Complainant's application for an interlocutory injunction was heard, with said motion to dismiss at New Orleans, Louisiana, on February 16, 1923, before Circuit Judges R. W. Walker and Alex C. King, and District Judge Rufus E. Foster, sitting as judges of the District Court under the Urgent Deficiencies Act (38 Statutes 219).

By an order dated March 15, 1923, filed on the following day (R. 70), Complainant's application for an interlocutory injunction was denied, and the amended motion of the United States and the defendant Bryant to dismiss the petition was granted, for the reasons and

upon the grounds indicated in the opinion of the court below (R. 64-70), which will be found reported in 287 Federal Reporter, 728.

An appeal direct to this court was prayed and allowed on April 6, 1923 (R. 71), assignments of error (R. 72) and a proper appeal bond (R. 78) were filed and a citation duly issued and service thereof waived (R. 77). A statement of the evidence was agreed to, approved and filed (R. 42), and the record was duly made up and filed in this court for review.

The orders of the Commission sought to be set aside were those entered by the Commission, on its own motion, relating to the so-called recapture of excess earnings or income under Section 15-a of the Interstate Commerce Act. They were dated, respectively, January 16, 1922 (R. 19-22) and March 16, 1922 (R. 22-24), and appear in full in the record. The order of January 16th related to the accounting period ended December 31, 1920, and commencing March 1, 1920, or September 1, 1920, depending, under paragraph (1) of the order, upon whether the reporting carrier accepted the six months guaranty afforded by Section 209 of the Transportation Act, 1920. It was, therefore, referred to in the petition as the 1920 order. The order of March 16th related to the calendar year 1921, and was, therefore, called the 1921 order. The 1920 period commenced, as to appellant, on March 1, 1920, as it did not accept the guaranty.

Paragraphs (2), (3) and (4) of the 1920 order, containing certain regulations, incorporated by reference into the 1921 order, are as follows:

“(2). That the excess income for the portions of a year ended December 31, 1920, shall be prelim-

inarily fixed as the income in excess of such proportions of 6 per cent of the value of the railway property held for and used in the service of transportation as the net railway operating income for the months of September to December, both inclusive, or for the months of March to December, both inclusive, as the case may be, in the three years ended June 30, 1917, bears to the total net railway operating income for the same three years.

“(3). The aggregate value of the railway property of the reporting carrier or carriers held for and used in the service of transportation shall be based preliminarily, in the case of carriers which made such returns directly or indirectly, upon the amount reported or used by such carrier or carriers as the aggregate value of railway property held for and used by them in the service of transportation in the proceeding entitled ‘in the matter of the applications of carriers in official, southern and western classification territories for authority to increase rates,’ Docket No. Ex Parte 74, with adjustments for—

“(a) New lines, extensions and additions, and betterments;

“(b) Retirements;

“(c) Amounts of property for which permission to retain earnings under paragraph (18) of Section 15a of the Interstate Commerce Act has been granted; and

“(d) Other increases or decreases, properly affecting the aggregate value of the railway property of such carriers held for and used in the service of transportation, claimed or reported by the carrier and supported by detailed explanations. The value of such railway property as reported, will be corrected and the actual value will be determined in the manner provided in paragraph (4) of Section 15a of the Interstate Commerce Act, and corresponding adjustments in amounts recoverable by and payable to the Commission will be effected. In

the case of those carriers which did not directly or indirectly make returns in connection with Ex Parte 74, the investment in road and equipment as of December 31, 1919, with proper adjustments as hereinabove indicated will be used for preliminary computations, and these preliminary computations will be similarly corrected after the determination of actual values in accordance with paragraph (4) of Section 15a of the Interstate Commerce Act.

"(4) The establishment of preliminary bases for prorating the return of 6 per cent, or ascertaining property values to which the rate is applicable, does not preclude any carrier from using such other bases as it considers more equitable and in accord with the facts; such other bases, however, must be fully and properly supported."

Pursuant to these rules each carrier subject to the Act, except sleeping car companies, street railways and the like, was directed by the two orders in question to report to the Commission, for the respective periods involved, the amount by which its net railway operating income, for the period covered by the order, exceeded or fell below that percentage of the value of its railway property fixed by said rules, with the details of the calculation, and a detailed statement of the valuation used. The orders also required, in cases where so-called excess income was reported, that the carrier state (a) the title of the fund account in which one-half of such excess was placed (b) as to the fund, the date when established, the amount therein, and how the assets therein are represented or held; and (c) the amount of the other half of such excess paid to the Commission and when and how paid. Each order also provided that if the half of the so-called excess income payable under such order to the Commission was unpaid it "should be paid by re-

mittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, Secretary of the Interstate Commerce Commission, Washington, D. C." (R. 21, 24.)

Appellant, under protest, duly filed its returns, as required by these orders of the Commission, showing therein so-called excess earnings, calculated *upon a valuation based solely on investment in road and equipment*, amounting to \$21,666.24 for the period March 1 to December 31, 1920 (R. 24-27); and for the calendar year 1921, amounting to \$33,766.99 (R. 28-33).

Under date of October 20, 1922, the Director of the Commission's Bureau of Finance wrote appellant, stating that appellant's returns showed "excess income as preliminarily computed," amounting to \$55,433.23, and demanding that appellant "fully comply with the orders" of the Commission by:

"(a) Advising the title of the fund account in which one-half of such excess was placed, when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held;

"(b) Remitting promptly to the Secretary of the Commission the remaining one-half of the excess income so preliminarily computed." (R. 34.)

The bill, in addition to describing the aforementioned orders and demand, alleged that the complainant was a carrier by railroad subject to the Interstate Commerce Act, with its principal office in the Eastern District of Texas, owning and operating a line of railroad wholly within said State; that the orders above referred to were entered by the Commission on its own motion and without complaint for the purpose and with the design of

enforcing those provisions of Section 15a of the Interstate Commerce Act relating to the recovery by and payment to the Commission of so-called excess railway operating income and the establishment and maintenance of the reserve fund mentioned in said Section 15a. It also alleged the filing of said returns and attached copies thereof to the petition as exhibits.

The bill further alleged that as to appellant the said orders of the Commission, and Section 15a of the Interstate Commerce Act upon which they were based, are null and void, because in contravention of the Constitution of the United States in the following respects:

(1) The recapture and reserve fund provisions of the Act, and the orders of the Commission based thereon, are in contravention of the Fifth Amendment to the Constitution of the United States, in this:

(a) The requirement that appellant pay to the Commission and into said reserve fund a portion of the income and revenues derived from, and being therefore, a part of, its private property, by it owned and devoted to carrier uses prior to and since the passage and approval of said Act, will, if enforced, take appellant's property without due process of law and without just compensation.

(b) Such requirement, if enforced, will deprive appellant of the liberty of using and disposing of its private property according to its own judgment and of the liberty of retaining and possessing its private property, without due process of law.

(c) Such requirement, if enforced, will deprive appellant of its property without due process of law by subjecting it to arbitrary, unequal and discriminatory

legislation by virtue of the fact that such requirement is not applied to other persons or corporations and not even to other railroad carriers similarly situated and in the same territory.

(d) The rates, fares and charges under which appellant's earnings accrued in each of the accounting periods covered by the orders of the Commission having been no more than reasonable, and the carriers operating in the rate group in which the Commission, in its order in Ex Parte 74, placed appellant, having failed to earn in either of said periods the fair return contemplated by Section 15a, to compel appellant to pay to the Commission and into said reserve fund any part of the revenues accruing to it by virtue of its favorable location, density of traffic or other special causes, is to deprive it of its property without due process of law and without compensation.

(e) While the general level of the rates charged and collected by appellant during the respective periods here involved must, as between the parties hereto, be presumed to be reasonable and non-excessive, nevertheless, specific rates are open to attack, within the periods of limitation, by shippers and consignees who may hereafter recover as reparation a part of the earnings shown on appellant's returns to the orders of the Commission. Likewise, recoveries later may, and probably will, be had against appellant on causes of action actually arising during the periods here involved, such as claims for loss of and damage to freight and injury to and death of persons, in connection with the conduct of railroad operations. By making no provision for refund or adjustment in case appellant have no

so-called excess earnings in the subsequent period or periods when any such recovery is paid by appellant, from which such payment may be deducted, the Act and the orders of the Commission subject appellant to a double recovery, upon the unwarranted presumption that appellant will always have so-called excess earnings sufficient to cover the payment of any such amounts, and therefore their enforcement will deprive it of its property without due process of law (R. 6-13).

(2) A large proportion of appellant's income, reflected in each of its said returns to the Commission, accrued solely as charges for the transportation of passengers and freight in intrastate commerce conducted wholly within the State of Texas; that neither interstate or foreign commerce nor the persons engaged therein could be in any manner injuriously affected by large earnings accruing to appellant from intrastate commerce, and that it is not within the province of Congress or the Commission to take from appellant any part of the earnings accruing to it from purely intrastate commerce, control over which has been expressly reserved to the State of Texas and its people by the Tenth amendment to the Constitution of the United States. The effect of the Act referred to and of the Commission's orders, if enforced against appellant, will be to require appellant to pay over to the Commission and to place in the reserve fund contemplated by the Act a portion of its earnings from purely intrastate commerce, and to limit and restrict the right of appellant, a Texas corporation, to earn money in the course of a business conducted wholly within that State, in violation of said tenth amendment (R. 13-14).

(3) The bill also contained an averment that while

the returns made by the appellant in pursuance of said orders truly reflected the property *costs* and *book* values, according to the rules and requirements of the Commission as understood by appellant, those figures did not represent the *true value* of appellant's property, devoted to and used for common carrier purposes; and that the same had been used in said returns because it understood the rules of the Commission required the use of the figures shown on its books of account, and it was proven that the *true value* of the property largely exceeded the figures used in the returns.

It was likewise pleaded that the returns did not show the *actual* receipts, expenses and income, properly and equitably attributable to the periods involved, as more fully set forth in the complaint respecting a lack of provision for adjustments to cover the delayed determination of causes of action arising in such periods (R. 5-6).

On the hearing, in support of the allegation that the true value of the property was not shown in the returns, appellant introduced in evidence (a) a valuation of appellant's property as of June 30, 1922, by the Railroad Commission of Texas, acting in the scope of its proper powers, in the sum of \$929,020.82 (R. 42-43); (b) the affidavit of A. E. Kerr, appellant's vice-president and general manager, stating that in his opinion the value of the property of appellant, held for and used in the service of transportation during the year 1920, was not less than \$796,668.80 and during 1921 not less than \$877,594.52 (R. 44-45); and (c) the affidavit of J. J. Balderach, appellant's vice-president and treasurer, stating that in his opinion the true value of appellant's said property was substantially in excess of any valua-

tion figure used in either of said returns or reports (R. 49). Balderach's affidavit also showed some pending, unadjusted claims arising in both periods.

The further question is therefore presented whether the court below erred in refusing the application for injunction and dismissing the bill in the light of these facts, pleaded, proven and plainly admitted by the motion to dismiss.

The court below held that Section 15-a levied an excise tax and was therefore not subject to attack as a deprivation of property without due process or just compensation. This construction of the statute is assailed in the assignment of errors (R. 72).

The questions involved on this appeal, therefore, are:

- (1) Do the orders of the Commission, and the Act upon which they are based, deprive appellant of its property without due process of law and without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States?
- (2) Do said orders and said act so directly affect and control the internal affairs and commerce of the State as to contravene the tenth amendment to the Constitution of the United States?
- (3) Does Section 15a of the Interstate Commerce Act, properly construed, levy an excise tax?
- (4) Did the court below err in dismissing the bill, in view of the facts: (a) that the amount of the so-called excess earnings, claimed in the Commission's demand and shown on the face of the returns, necessarily depends upon the value of the property, and (b) that

upon this record it must be conclusively presumed that the *true* value of the property is far in excess of the amounts used in the returns?

These questions logically divide themselves, for discussion, into many subheads and propositions and will be so divided for the argument which follows in this brief.

Specification of Errors.

For a reversal of this case we rely upon the assertion that the court below erred in the following and each of the following respects, which are set forth in the assignment of errors filed in the court below, to-wit:

"1. In denying and refusing appellant's application for an interlocutory injunction as prayed for in its petition herein.

"2. In granting the motion of the defendant, The United States of America, to dismiss appellant's petition, and in dismissing the same.

"3. In holding and deciding that, as to appellant, the Act of Congress referred to in its petition herein, and the orders of the Interstate Commerce Commission entered in pursuance thereof and likewise referred to, are valid, constitutional and enforceable to the extent of that portion of appellant's earnings thereby required to be paid to the Interstate Commerce Commission, as levying and assessing a tax.

"4. In holding and deciding that the part of the income of appellant required by said act and by said orders to be paid to the Interstate Commerce Commission was not collected by appellant absolutely as its property but that the same was earned and collected under the terms of the Transportation Act, 1920, in trust for the United States.

"5. In holding and deciding that appellant dur-

ing either of the periods involved in this suit had any excessive income or earnings.

"6. In holding and deciding that appellant does not contend that the part of its net revenue from its railway operations, which, under the provisions in question, it is permitted to retain, is less than a fair and remunerative return on its investment in road and equipment.

"7. In failing to give full and due consideration to the undisputed evidence to the effect that the value of appellant's property held for and used in the service of transportation and therefore a fair return upon such value was and is far in excess of the amounts shown on the reports made by appellant to the Interstate Commerce Commission for the respective periods involved.

"8. In assuming, holding and deciding that in the several years during which appellant may be obliged to pay liabilities which accrued during one or both of the periods involved in this suit, appellant will have so-called excess earnings equal to or in excess of the amount of such payments and that appellant will thereby secure the same full benefit of deducting such payment or payments as would be afforded by a provision for a refund by the Interstate Commerce Commission to appellant, based upon actual payments of liabilities accrued in previous accounting periods during which so-called excess earnings existed.

"9. In holding and deciding that what are proper deductions to be made from gross income for the ascertainment of net income for a given period is a matter for legislative rather than judicial determination.

"10. In holding and deciding that it may well be questioned whether a claim for overcharge would be sustained where a rate approved by the Commission was charged.

"11. In holding and deciding that it hardly lies in the mouth of appellant to suggest that the rates

charged by it will be considered unreasonable where fixed by it within a maximum allowed by the Interstate Commerce Commission.

"12. In holding and deciding that appellant could not be made liable by a shipper as for an overcharge for any moneys paid therefrom to the United States under the terms of the Interstate Commerce Act.

"13. In holding and deciding that appellant has no right to restrain the government from collecting from it so-called excess earnings which accrued to it from the collection of excessive charges; for that the Interstate Commerce Act expressly imposes liability upon appellant for all such amounts so collected by it, and the shipper damaged thereby has two years in which to file his claim against appellant; and if appellant may be compelled to pay to the government any sum accruing from such collections and then later be required to respond to the claim of the shipper when the Interstate Commerce Commission has determined the fact and amount of damage, the result would be the payment of a part of such excess to the government and a subsequent payment to the shipper, out of appellant's own funds, of the full amount of the excess, resulting in a double recovery against appellant, without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

"14. In holding and deciding that appellant may be compelled to pay to the Interstate Commerce Commission a portion of the money accruing to it from the exaction of an unreasonable rate and then subsequently be compelled to pay to the shipper as reparation the amount to the extent of which the rate may be determined to have been unreasonable, being a part of the so-called excess earnings already paid to the said Commission.

"15. In holding and deciding that as to appellant the requirements of Section 15a of the Interstate Commerce Act, and said orders of the Interstate

Commerce Commission entered in pursuance thereof, and each of them, with respect to the payment of money to the Interstate Commerce Commission by appellant, are not, as to appellant, null and void, because taking appellant's private property without due process of law and without compensation, in contravention of the Fifth Amendment to the Constitution of the United States.

"16. In holding and deciding that, as to appellant, Section 15a of said act, and said orders of the Interstate Commerce Commission, and each of them, requiring a certain portion of appellant's earnings to be placed in a reserve fund, and prohibiting the use of such fund except for certain limited purposes, are not as to appellant null and void, because taking appellant's private property without due process of law and without compensation in contravention of the Fifth Amendment to the Constitution of the United States.

"17. In failing and refusing to hold and decide that the property of appellant and the entire income, revenues, earnings and profits arising therefrom are the private property of appellant and that said act and said orders, insofar as they attempt to require the payment of money by appellant to the Interstate Commerce Commission, and into said reserve fund, are in violation of the Fifth Amendment to the Constitution of the United States and therefore void as taking appellant's private property without just compensation and without due process of law.

"18. In failing and refusing to hold and decide that the provisions of said act and said orders requiring a portion of appellant's so-called excess earnings to be placed in a reserve fund to be drawn upon for specific and limited purposes only, deny to appellant, without due process of law, and without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States, the liberty of ownership, control, use and disposition of its property.

"19. In failing and refusing to hold and decide

that said act and said orders, and each of them, are void insofar as they undertake to regulate, limit or restrict the use or expenditure of so-called excess earnings by appellant and to require appellant to pay any portion thereof to the Interstate Commerce Commission, for any purpose, for that the enforcement thereof against appellant would deny to it the equal protection of the law, subject it to unequal, arbitrary and discriminatory laws and thereby take its private property without due process of law and without compensation, in violation of the Fifth Amendment to the Constitution of the United States.

"In failing and refusing to hold and decide that because appellant owned and operated its properties long prior to the passage and approval of the Act containing said Section 15a, appellant, under the Constitution of the United States, owned and possessed and has continuously since owned and possessed the right to collect and receive, and to retain and exercise, complete, untrammelled and unrestricted dominion and control over all revenues, earnings, receipts and income produced by said properties, and that all savings and earnings resulting therefrom became instantly upon the accrual thereof and continued thereafter to be the private property of appellant; and, insofar as said section and said orders undertake to compel appellant to pay to said Commission for public use, or otherwise, or to retain and use only in certain contingencies, and then only for certain limited purposes, any part of such revenues, earnings, receipts and income, said Act and orders are null and void, for that if enforced against appellant they would deprive appellant of its liberty and of its private property without compensation and without due process of law, and deny to appellant the equal protection of the law, in violation of the Fifth Amendment to the Constitution of the United States and of the fixed and vested rights, privileges and immunities which appellant held and possessed under the Constitution of the

United States at the time of the passage and approval of said act.

"21. In holding and deciding that the United States could for any purpose have any interest in or title to any amount or sum of money accruing to appellant for transportation services not performed for the United States.

"22. In failing and refusing to hold and decide that all earnings and income accruing to appellant from traffic moved on just and reasonable rates is the private property of appellant and can not be taken without due process of law nor without just compensation consistently with the Fifth Amendment to the Constitution of the United States.

"23. In failing and refusing to hold and decide that said Act and orders are void as taking appellant's private property without due process of law and without compensation, in violation of the Fifth Amendment to the Constitution of the United States, in requiring payment of so-called excess earnings to the Interstate Commerce Commission and into said reserve fund without making reasonable provision for the final determination of the actual net earnings for the year or period involved and for proper refund or adjustment based thereon.

"24. In failing and refusing to hold and decide that said Section 15a is contradictory in its terms and incapable of enforcement, and that therefore said section, and the orders of the Interstate Commerce Commission predicated thereon, are null and void as to appellant, because the enforcement thereof would take its private property without due process of law and without compensation, in violation of the Fifth Amendment to the Constitution of the United States.

"25. In holding and deciding that as to appellant the provisions of said section 15a and said orders of the Interstate Commerce Commission requiring the payment of money by appellant to said Commission and into a reserve fund are valid and enforceable and are not, as to appellant, null and

void as an unwarranted regulation of and burden upon, commerce conducted wholly within the State of Texas and the earnings and revenues therefrom, imposed by the Congress of the United States and the Interstate Commerce Commission in contravention of the Tenth Amendment to the Constitution of the United States.

"26. In failing and refusing to hold and decide that as to appellant said section and said orders in effect impose a direct and unwarranted limitation upon the right of a corporation created under the laws of the State of Texas to earn money from the conduct of commerce carried on wholly within the State of Texas, and in no wise related to interstate or foreign commerce, and not subject to the control of Congress or of the Interstate Commerce Commission, and that said act and orders are therefore void because in contravention of the Tenth Amendment to the Constitution of the United States.

"27. In holding and deciding that the Congress and the Interstate Commerce Commission are not prohibited by the Tenth Amendment to the Constitution of the United States from requiring appellant to pay to the Interstate Commerce Commission any part of any fund earned by appellant in purely intrastate commerce within the State of Texas." (R. 72-76.)

Brief of the Argument.

Inasmuch as the force and validity of the Commission's orders sought to be set aside in this case necessarily depend upon the construction and validity of the law upon which they were based, and for the enforcement of which they were intended, we copy here in full, for the convenience of the court and counsel, the material portions of Section 15a of the Interstate Commerce Act (41 Stat. 488):

"Sec. 15a. (1) When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this act, excluding (a) sleeping car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any beltline railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term 'net railway operating income' means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

"(2). In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate group or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The Commission shall from time to time determine and make public what percentage of such

aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission.

“(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this act in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

“(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

"(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purpose of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

"(7) For the purpose of paying dividends or interest on its stocks, bonds or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

"(8) Such reserve fund need not be accumulated and maintained by any carrier beyond a sum

equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose.

“(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

“(10) The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in the fund not so employed shall be invested in obligations of the United States or deposited in the authorized depositories of the United States subject to the rules promulgated from time to time by the Secretary relating to government deposits. * * * ”

“(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any

particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

“(18) Any carrier, or any corporation organized to construct and operate a railroad, proposing to undertake the construction and operation of a new line of railroad may apply to the Commission for permission to retain for a period not to exceed ten years all or any part of its earnings derived from such new construction in excess of the amount heretofore in this section provided, for such disposition as it may lawfully make of the same, and the Commission may, in its discretion, grant such permission, conditioned, however, upon the completion of the work of construction within a period to be designated by the Commission in its order granting such permission.”

Paragraphs (11) to (16), inclusive, are omitted because they deal only with the administration by the Commission of the general railroad contingent fund referred to in the other paragraphs of the Section.

Under what constitutional power of Congress were the foregoing provisions enacted? The District Court held that these provisions were the result of an exertion of the taxing power (R. 67, 287 Fed. 728). That this conclusion is erroneous will, we think, be demonstrated. Congress, by including these provisions in the Interstate Commerce Act, expressed the view that this section was a regulation of commerce between the States. “As a whole, these acts show that what is intended is to regulate interstate and foreign commerce.” (*State of Texas v. Eastern Texas R. R. Company*, 258 U. S. 204, 42 Sup. Ct. Rep., 281).

The act can properly be sustained if at all, only under

the power of Congress to regulate commerce, and if the act under consideration is not a valid regulation of commerce, it must fall for a total want of Congressional power.

The four principal questions involved in the case are:

(a) DOES THE SO-CALLED RECAPTURE CLAUSE OF THE TRANSPORTATION ACT VIOLATE THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

(b) DOES IT VIOLATE THE TENTH AMENDMENT?

(c) DOES IT ASSESS OR LEVY A TAX?

And if these questions be answered favorably to the government,

(d) DOES THE RECORD IN THIS CAUSE SHOW A VALUATION UPON WHICH THE QUANTUM OF THE SO-CALLED EXCESS EARNINGS MAY BE RECAPTURED?

In other words, does the measure of the value of appellant's property on the basis applied by the Interstate Commerce Commission square with the doctrine of the Missouri telephone case recently decided by this court?

At the threshold of the first question we are confronted with two propositions, the answers to which will tend very greatly to simplify the determination of the issues here involved.

The first preliminary question is: How far is the power of Congress to regulate interstate commerce supreme? How far is that power subject to other consti-

tutional limitations? And how far, if at all, may Congress exercise that power in conflict with or in violation of the Fifth Amendment of the Constitution of the United States?

The second preliminary question involved, which may be said to grow out of the first, is: how far Congress may exercise its power of regulation upon private property devoted to a public use, and how far the public use of such private property modifies, impairs or destroys the private character of the property and relieves it, if at all, from the sanctity and protection of the Fifth Amendment.

I.

The power of Congress to regulate Interstate Commerce is subject to constitutional limitations and particularly to the limitations of the Fifth Amendment to the Constitution of the United States.

This principle has been so frequently enunciated by this court that a very brief reference to the decisions will suffice to sustain it:

In *Gibbons v. Ogden*, 9 Wheat. 1, 68 Ed. 23, Chief Justice Marshall, referring to the power of Congress over interstate and foreign commerce, said:

“This power like all others vested in Congress is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution.”

In *Champion v. Ames*, 188 U. S., 321, 47 L. Ed. 492, 501, the court said:

“It must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no

limitations except such as may be found in the constitution."

In *United States v. Joint Traffic Association*, 171 U. S., 505, 43 L. Ed. 259, 288, the court said:

"The power to regulate commerce has no limitations other than those prescribed in the Constitution. The power, however, does not carry with it the right to destroy or impair those limitations and guaranties which are also placed in the Constitution or in any of the amendments to that instrument."

In *Interstate Commerce Commission v. Brinson*, 154 U. S., 447, 38 L. Ed. 1047, 1058, this statement occurs:

"It was said in argument that the Twelfth Section (of the Interstate Commerce Act) was in derogation of those fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen. It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guarantees."

Monongahela Nav. Co. v. United States, 148 U. S., 312, 37 L. Ed. 463, announces the same principles:

"But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of Commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to limitations imposed by this Fifth Amendment and can take only on pay-

ment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish postoffices and postroads; but if Congress wishes to take private property upon which to build a postoffice, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor."

In *Adair v. United States*, 208 U. S., 161, 52 L. Ed. 436, 445, the court referring to the power of Congress over interstate commerce, said that this power "can not be exerted in violation of any fundamental right secured by other provisions of the Constitution."

In *Wilson v. New*, 243 U. S., 332, 61 L. Ed., 755, 776, the court said:

"The capacity to exercise the private right free from legislative interference affords no ground for saying that legislative power does not exist to protect the public from the injury resulting from a failure to exercise the private right. In saying this, of course, it is always to be borne in mind, that as to both carrier and employe, *the beneficent and ever present safeguards of the Constitution are applicable, and therefore both are protected against confiscation and against every act of arbitrary power*, which, if given effect to, would amount to a denial of due process or would be repugnant to any other constitutional right." (Italics ours.)

In the *Railroad Commission Cases*, 116 U. S., 307, 29 L. Ed., 636, the rule was thus stated:

"From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. *This power to regulate is not the equivalent of confiscation*. Under pretense of regulating fares and freights the State cannot require a railroad corporation to carry persons or

property without reward; neither can it do that which in law amounts to a taking of private property without just compensation or without due process of law." (Italics ours.)

Speaking through Mr. Justice Harlan, in *Scranton v. Wheeler*, 179 U. S., 141, 45 L. Ed., 126, 133, the court said:

"Of course, in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use."

Referring to the power of Congress to improve the internal waterways in aiding navigation, the court, in *United States v. Cress*, 243 U. S., 316, 326; 61 L. Ed., 746, 752, citing some of the other cases herein referred to, said:

"But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment."

In *United States v. Lynah*, 188 U. S., 445, 465, 471; 47 L. Ed., 539, 546, 549, Mr. Justice Brewer, speaking for the court, said:

"All private property is held subject to the necessities of the government. The right of eminent domain underlies all such rights of property. The government may take real or personal property whenever its necessities or the exigencies of the occasion demand. So, the contention that the government had a paramount right to appropriate this

property may be conceded, but the Constitution, in the Fifth Amendment, guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation.”

Again, he said:

“If any one proposition can be considered as settled by the decisions of this court, it is that, although in the discharge of its duties the government may appropriate property, it can not do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation.”

In other words, it has been so thoroughly established as to be now indubitable that the power of Congress to regulate commerce can be exercised without any limits whatsoever, except those prescribed by the Constitution itself; but that those other limitations, placed upon Congress by the Constitution, are just as binding upon the courts and are just as powerful for the protection of the citizen as the power to regulate commerce by Congress.

Therefore, if the only source of congressional power available to support the law in question is the authority to regulate commerce, the enactment cannot be sustained, if, in violation of the Fifth Amendment, it deprives appellant of its property without due process of law, or without just compensation; or if, in violation of the Tenth Amendment, it necessarily regulates the internal affairs of the State, not as merely incidental to a real regulation of interstate commerce, but directly, and without any real and substantial relation to the proper scope of a regulation of interstate commerce. *Hammer v. Dagenhart*, 247 United States, 251, 62 L. Ed. 1101.

These authorities conclusively establish the proposition, considered in connection with those opinions of this court discussing the constitutional power to regulate commerce and declaring that power to be supreme, that this court has always nevertheless held that the exercise of that power was, and is, and shall forever be, subject to the limitations in the Fifth Amendment, and that the protection of private property is just as complete under the Fifth Amendment and just as sacred against the right to regulate commerce, and just as full protection to the citizen against that power as it is against any other power sought to be exercised by Congress.

II.

The property of appellant held for and used in the service of transportation during the periods here involved, while devoted to a public use, has remained nevertheless at all times appellant's private property, protected as such by the Fifth Amendment. The income produced by that property, and the revenues accruing from its use, are likewise private property, and is likewise protected. A seizure, direct or indirect, of any part of such income or revenues necessarily reduces the productiveness or earning power of the property and, by that much, constitutes a taking of appellant's property because the value of the property depends directly upon its capacity to produce a return.

It was alleged in the bill of complaint that appellant was then, and had been since a date long prior to the 29th day of February, 1920, a common carrier by railroad, owning and operating a line of standard gauge railroad situated in the State of Texas, and that the

earnings and revenues from that railroad property were sought to be affected and taken by the act and orders here involved. (R. 2, 3, 5-7.) That the railroad property, so owned and operated by appellant prior to and since the enactment of the law herein assailed, is the private property of appellant, can not be doubted. This court has so repeatedly held this to be true that the doctrine may not at this date successfully be challenged. A brief reference to important decisions on the question is made.

In *Interstate Commerce Commission v. Chicago Great Western Railroad*, 209 United States, 108, 52 L. Ed., 705, Mr. Justice Brewer said:

"It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager."

In a more recent case, *Vandalia Railroad Co. v. Schnull*, 255 United States, 113, 65 L. Ed., 539, the rule is thus stated:

"A railroad is private property, and as such, a rate may be fixed for its use; but it is private property devoted to the public service, and as such it is subject to the power of the State to see and require that the rate fixed be just and reasonable—one that, while it will yield a revenue to the railroad, will be proportioned to that which should be charged to the public. And this relation of right and power is illustrated in many cases."

In *Missouri Pacific R. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. Ed. 489, it is declared, at page 415:

"A railroad corporation doubtless holds its station grounds, tracks, and right-of-way as its private property, but for the public use for which it was incorporated, and may, in its discretion, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers * * * * , but how far the railroad company can be compelled to do so, against its will, is a wholly different question."

The issue made in that case was whether or not the land of the railroad company devoted to a public use, might be taken against its will, and devoted to some other use which, in the opinion of the Nebraska Board of Transportation, was necessary or desirable for the use of an elevator to be erected upon the premises. And in concluding the opinion of the court Mr. Justice Gray (page 417) declared:

"This court, confining itself to what is necessary for the decision of the case before it, is unanimously of the opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment to the Constitution of the United States. *Wilkinson v. Leland*, 27 U. S. 2 Pet. 627, 658, (7:42, 553); *Den, Murray, v.*

Hoboken Land & I. Co., 59 U. S. 18 How. 272, 276 (15:372, 374); Citizens Sav. & L. Assn. v. Topeka, 87 U. S. 20 Wall. 655 (22: 455); Davidson v. New Orleans, 96 U. S. 97, 102 (24: 616, 618); Cole v. LaGrange, 113 U. S. 1 (28: 896); Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 158, 161, ante, 59); State v. Chicago, M. & St. P. R. Co. 36 Minn. 402."

In the case of *Missouri Pacific R. R. Co. v. Nebraska*, 217 U. S. 196, 54 L. Ed. 727, the court speaking through Mr. Justice Holmes said:

"It is also true that the States have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—power commonly called the police power. But railroads, after all, are properly protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away."

In *Northern Pacific R. Co. v. North Dakota*, 236 U. S. 585, 59 L. Ed. 735, Mr. Justice Hughes delivered the opinion of the court, and at page 595 said:

"The railroad property is private property devoted to a public use. * * *

"But, broad as is the power of regulation, the State does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed."

And at page 604, in concluding the opinion, the following language was used:

"But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and *thus the carrier would be denied a reasonable reward for its service* after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority." (Italics ours.)

In *Norfolk & Western v. Conley*, 236 U. S. 605, 59 L. Ed. 745, Mr. Justice Hughes, delivering the opinion, at page 608 said:

"The fundamental question presented is whether the validity of the passenger rate can be determined by its effect upon the passenger business of the company, separately considered. What has been said in the opinion in *Northern P. R. Co. v. North Dakota*, decided this day (236 U. S. 585, ante, 735, 35 Sup. Ct. Rep. 429), makes an extended discussion of this question unnecessary. It was recognized that the State has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification or the adaptation of rates to various groups of services. It was further held that despite this range of permissible action, the State has no arbitrary power over rates; that the devo-

tion of the property of the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the State may not select a commodity or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal."

In *Great Northern Railway Company v. Minnesota*, 238 U. S., at page 340, 59 L. Ed. 1337, Mr. Justice McReynolds, speaking for the court, said:

"A railroad's possessions are subject to its public duty; but beyond this and within charter limits, like other owners of private property, it may control its own affairs."

In *Chicago, M. & St. P. R. R. Co. v. Wisconsin*, 238 U. S. 491, 59 L. Ed., 1423, Mr. Justice Lamar, speaking for the court on the power to regulate the making of berths in sleeping cars, said:

"The right of the State to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management, or the taking of the carrier's property without compensation."

In *Reagan v. Farmers Loan & Trust Company*, 154 U. S. 362, 38 L. Ed. 1014, we find this declaration:

"This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of govern-

ment, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In *Wilson v. New*, 243 U. S., 332, 61 L. Ed. 755, a case which bordered so close on confiscation as to cause this court to decide it by a bare majority, this principle, that railroad property although devoted to a public use is private property, was never questioned or disputed. The Chief Justice, in the majority opinion, said:

"That regulation gives the authority to fix for interstate carriers a reasonable rate, *subject to the limitation* that rights of property may not be destroyed by establishing them on a confiscatory basis, is settled by long practice and decisions." (Italics ours.)

And, in the dissenting opinion Mr. Justice Pitney said, speaking of railroads:

"The devotion of their property to the public use does not give the public an interest in the property, but only in its use."

In the notable opinion of Mr. Justice Hughes, in the *Minnesota Rate Cases*, 230 U. S. 352, 57 L. Ed. 1511, 1555, 1564, we find the following:

"The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge for the service rendered. But the State has not seen fit to undertake the service

itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title, *but to the right to receive just compensation for the service given to the public.* * * *

"The property is held in private ownership and it is that property and not the original cost of it, of which the owner may not be deprived without due process of law." (Italics ours.)

The same principle has been reiterated by this court at the last term. In *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission* (43 Sup. Ct. 544, 67 L. Ed. Adv. Ops. 619, decided May 21, 1923), Mr. Justice McReynolds, speaking for the court, after quoting a portion of the language we have just taken from the opinion in the Minnesota Rate Case, said:

"It must never be forgotten that while the State may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership."

The same principle was also involved and adhered to in the later cases of *Georgia Railway & Power Company v. Decatur*, 43 Sup. Ct. Rep. 613; 67 L. Ed. Adv. Ops. 669, and *Georgia Railway & Power Company v. College Park*, 43 Sup. Ct. Rep. 617, 67 L. Ed., Adv. Ops. 673, both decided June 4, 1923.

It is well settled by the decisions of this court that the income from private property becomes likewise private property immediately as it accrues; that it is in fact the capacity of private property to produce income

which gives it its chief value, and that the destruction of this attribute is to that extent a destruction of the private property affected, and, a seizure of this attribute is necessarily a seizure of at least a part of the private property involved.

In *Branson v. Bush*, 251 U. S., 182, 64 L. Ed. 215, 219, the court quoted, with approval, the following excerpt from the opinion in *Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Backus*, 154 U. S., 439, 38 L. Ed. 1041:

“But the value of property results from the use to which it is put and varies with the profitability of that use, present and prospective, actual and anticipated. *There is no pecuniary value outside of that which results from such use.* The amount and profitable character of such use determines the value.” (Italics ours.)

In *Omnia Commercial Company v. United States*, 43 Sup. Ct. Rep. 437, 67 L. Ed., Adv. Ops. 468, decided April 9, 1923, this court said:

“In the *Monongahela Navigation Company Case* (148 U. S. 312, 37 L. Ed. 463) the property which was taken was a lock and dam built by the company pursuant to the invitation of the United States and the State of Pennsylvania, the latter, in consideration, giving the company a franchise to exact tolls. The franchise therefore was not merely a contract in respect of property taken, but was an integral part of it; and

“So before this property can be taken away from its owners the whole value must be paid; and the value depends largely upon the productiveness of the property, the franchise to take toll,’ the lock and dam constituting, in effect, a going concern

whose value was *of course* affected by what it would produce." (Italics ours.)

In *South Utah Mines & Smelters v. Beaver County*, 43 Sup. Ct. Rep. 577, 67 L. Ed. Adv. Ops. 608, decided May 21, 1923, Mr. Justice Sutherland, speaking for the court, said:

"The value of property bears a relationship to the income which it affords. If it be property whose production is uniform and of indefinite duration, the capitalization of the net income derived from it at the going rate of interest, in the absence of a more certain method, will furnish a reasonable measure of the value."

In addition to what was quoted above, the court in *Monongahela Navigation Company v. United States*, *supra*, said:

"It is also suggested that the government does not take this franchise; that it does not need any authority from the State for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation with such a franchise to take tolls as it chooses to give. *But this franchise goes with the property*, and the Navigation Company, which owned it, is deprived of it. The government takes it away from the Company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not

merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived." (*Italics ours.*)

It must be borne in mind that this appellant acquired from the State of Texas, by the same charter which authorized it to construct and operate a railroad, the right to exact tolls for services rendered by that property.

By Article 6541 of the Revised Statutes of Texas, 1911, under which appellant was organized, it was provided, with reference to railroad companies organized under such laws, that:

"Such corporation shall have the right to receive and convey persons and property on its railway by the power and force of steam or by any mechanical power."

Article 6543 reads as follows:

"Such corporation shall have the right to regulate the time and manner in which passengers and property shall be transported, *and the compensation to be paid therefor*, subject nevertheless to the provisions of this or any other law that may hereafter be enacted."

And by sub-division 2 of Article 6654, defining the powers and duties of the Railroad Commission of Texas, it was provided that:

"The Commission shall have the power and it *shall be its duty* to fix to each class or subdivision of freight a reasonable rate." * * *

Article 6618 reads in part as follows:

"The passenger fare upon all railroads in this State shall be three cents per mile, with an allow-

ance of baggage to each passenger not to exceed one hundred pounds in weight. * * * ”

The franchise of this appellant, therefore, to exact tolls for the service rendered by it, is, under the doctrine of the *Monongahela Case*, an inseparable part of its property, and a taking of any part of that franchise, such as will necessarily result from the enforcement of this law and these orders of the Commission, will obviously result in depriving appellant of its private property.

In *Chicago, Milwaukee & St. Paul R'y Co. v. Minnesota*, 134 U. S., 418; 33 L. Ed. 970, it was said:

“If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, *in substance and effect, of the property itself* without due process of law, and in violation of the Constitution of the United States.” (Italics ours.)

This principle, indeed, that the income derived from private property is a part of the property itself; that the right to employ private property for productive uses and to enjoy the fruits of the same is the *property* protected by the Constitution; and that a deprivation of the income from such property is a taking of the owner's property, is the fundamental principle upon which this court has based its decisions in the great rate cases that have come before it. In all of those cases where rates have been enjoined, or have been sought to be enjoined, upon the ground that they were confiscatory, such as *Reagan v. Farmers Loan &*

Trust Company, 154 U. S., 362, 38 L. Ed., 1014; *Minnesota Rate Cases*, 230 U. S. 352, 57 L. Ed., 1511; *Knoxville v. Knoxville Water Company*, 212 U. S. 1, 53 L. Ed., 371; *Stone v. Farmers Loan & Trust Company*, 116 U. S. 307, 29 L. Ed. 636, and *Northern Pacific R. R. Co. v. North Dakota*, 236 U. S. 585, 59 L. Ed., 735, the court has constantly adhered to the principle that the owner of property, which he employs in the public service, is entitled under the Constitution to charge *a reasonable rate for the services rendered*, and that to take this right away from him is to deprive him of the property itself. It is wholly unnecessary to accumulate citations of these cases. Indeed, the principle is so well settled that we not infrequently find the court deciding cases upon the basis of that doctrine without a full explanation of it or with a mere passing assumption of its existence and effect.

We find the appellant then, at the time of the passage of this law (February 29, 1920), and on the dates when the Commission entered these orders, in full possession and in absolute ownership of a railroad property consisting in part, under the decisions of this court and the charter issued to appellant by the State of Texas, of a franchise to collect reasonable rates for the employment of that property in the public service. This was alleged in the bill, was substantially admitted by the answer of the Interstate Commerce Commission (R. 35-39), and was conclusively admitted by the motion of the United States to dismiss the bill. Hopkins, Ann. Eq. Rules, 3rd Ed., 185-187; Eq. Rule 29; *United States v. Railway Employees Department*, 286 Fed. 228, 230; *Krause v. Brevard Tannin Co.*, 249 Fed. 538, 548; *Stromberg v. Holly*, 260 Fed. 220.

In the case last cited, the court said:

"It is elementary that on such motion the allegations of material facts which are well pleaded in the bill must be accepted as true for the purposes of the motion, and that only defenses in point of law arising upon the face of the bill may be raised in this manner and called up and disposed of by the court before final hearing."

If the effect of this Act, therefore, and of the orders of the Commission, is to take any part of the earnings accruing to appellant by reason of the employment of its property in the public service, at reasonable rates, they are clearly confiscatory, repugnant to the Fifth Amendment, and void. That they can have no other effect is plain.

III.

The provisions of the transportation act for the disposition of net railway income are not regulation of Interstate Commerce, but a direct taking of the private property of the carrier, and of the liberty of the use of the property of the carrier, without due process of law and without just compensation; and are an invasion of the property rights of the carrier, and are in violation of the Fifth Amendment of the Constitution of the United States.

This main proposition naturally divides itself into a multiplicity of questions. We have tried to segregate these questions and discuss them separately, with the authorities pertinent to each point. This has to a degree made repetition to a considerable extent unavoidable. Some of the propositions run so closely parallel that we have in some instances used the same authority,

and the same language in the same authority, for the support of two or more propositions. This has made the brief much more extended than upon first examination would appear to be necessary, but it has seemed to us that some repetition on separate sub-propositions is less objectionable than continual reference to other parts of the brief. The subject-matter is of such vast importance, involving not alone this appellant, but every carrier in the country which may, for a period of five, ten, or twenty-five years, be unable to pay its fixed charges, and then by some fortuitous chance have for some one year an excess net income under the act, in which case its property may be taken just as it is proposed to take the property of appellant, notwithstanding the fact that for all of the other years of the period its income be wholly insufficient for its actual needs.

In other words, it is not impossible for any railroad in the country, however poor its general income may be, to have some one year in its history that would be seriously affected by the application of this law. It therefore becomes important to every carrier in the country.

Prior to the adoption of the transportation act the railroads of the country had been under Federal control for more than two years. We think we may say that the public was convinced that Federal control had been a failure. The expense was enormous, the labor of the country was disorganized, the public was dissatisfied, and investors in railroad securities felt that their properties were jeopardized.

The dominant thought before Congress at the time was two-fold: First, to release the railroads of the country from governmental operation, and, second, to

prevent the transportation system of the country from being wrecked.

The credit of the roads was bad; investors in railroad securities under existing conditions could not be found, and it was considered most unwise to return the roads to the owners without such safeguards as would save the transportation systems of the country from ruin. The conditions of the country at the time are extensively discussed in the opinion of the court in *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy Railroad Company*, 257 U. S. 563, 66 L. Ed. 371.

It became necessary to provide new policies, new regulations, and to secure increased revenue for the railroads.

The Congress fully recognized this fact, and we quote an extract from the Senate Committee report No. 304, on Senate Bill 3288, as follows:

"In considering this phase of the subject, it should be constantly borne in mind that if our policy is to be private operation of the instrumentalities of transportation there must be a large and constant inflow of capital. As commerce increases in volume, the facilities of transportation must increase; and, without reckoning the funds which must be secured to discharge maturing obligations already in existence, it will be conceded by everybody that immense sums will be required from year to year for new construction, additional equipment, and necessary improvement. The capital thus demanded must be drawn from those who have money to invest, and, of course, it must be voluntarily contributed. If the people who have money will not invest it in the transportation enterprise, private ownership and operation under public control must necessarily fail. It is apparent, therefore, that any legislation which may be proposed upon

the hypothesis of private ownership and operation must tender to the future investor reasonable security for the investment he is asked to make, and reasonable assurance of such yearly return upon his money as will induce him to enter the field. The better the security and the more certain the return, the less will be the rate required to attract the investment."

Said report further states:

"It is obvious that if the law gives to the carriers the assurance of income heretofore mentioned there should be a maximum beyond which an individual carrier shall not be permitted to retain for its own use all it may receive under a given body of rates. Referring to the illustrations already given, it is seen that with uniform rates, and they must be uniform in competitive territories, one carrier will receive an operating income of 2 per cent., another 4 per cent., and another 6 per cent., another 8 per cent., and others still more. The bill fixes a standard of excess income and requires the carriers which receive an excess income (which will hereafter be explained in detail) to pay the excess to the transportation board for uses that have been mentioned and which will be more fully stated in a subsequent paragraph of this report." * * * "If the lawyers who insist that taking excess income is unconstitutional are right in their premises, their conclusion would be unassailable. They assume that all the earnings of a given railway under a prescribed body of rates become the absolute property of the carrier which receives them. This is not true under the system which the bill creates; and, therefore, the conclusion is unsound. If there were but one railway in the country, it would be entirely possible for the regulating commission to fix rates for it under which it could not earn more than 6 or 7 per cent. upon the value of its property, but we have a thousand railways; and rates for transpor-

tation must be fixed with reference to all of them and to the needs of the people to whom all of them render their service. These conditions make it utterly impossible to fix rates which are reasonable for one carrier, considered apart from all the remainder. It is, therefore, in the competence of Congress to declare that the income which any particular carrier receives beyond a fair return upon the value of its property, it receives as a trustee for the public and not as its own absolute property. If this analysis of the power of regulation is not sustained, then the authority granted in the Constitution is a mere delusion."

That Congress was initiating a new and a different policy than any which had theretofore been recognized by national legislation, was expressly declared by this court in the *New England Divisions Case* (*A. C. & Y. R'y Co. v. United States*, 43 Sup. Ct. Rep. 273), in the following language:

"The transportation act 1920 introduced into the federal legislation a new railroad policy. Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S., 563, 585, 42 Sup. Ct. 232, 66 L. Ed. 371.

"Theretofore the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates.

"The 1920 act sought to insure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language. And, to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designated to secure a fair return on capital devoted to the transportation service. Upon

the Commission new powers were conferred, and new duties were imposed."

The contention which is urged in the report, to the effect that it is within the competence of "Congress to declare that the income which any particular carrier receives beyond a fair return upon the value of its property, it receives as a trustee for the public and not as its own absolute property," overlooks the elemental considerations of the powers of the Congress under the Constitution.

A carrier has no right to collect a rate for a service that is not in and of itself reasonable for that service. The carrier has no right to demand of the shipper to pay more than is reasonable for the service. The Commission has no right to fix a rate that is not reasonable for the service, and the Congress has no power to compel the shipper to pay more than is reasonable for the service, nor to take from the shipper for governmental purposes anything that is more than reasonable for the service, and therefore the carrier has no right to collect an excess service charge and hold the excess as trustee for the United States.

These principles are expressly recognized by the transportation act itself. Paragraph 17, of Section 15-A, declares that:

"The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates."

If the rate for the service charged by the carrier fall within this category, the shipper is entitled to repara-

tion to the amount of the excessive overcharge, notwithstanding it may already have been paid by the carrier to the government.

If the earnings of the carrier arise from reasonable charges for the service rendered, it is inconceivable that such earnings are not the private property of the carrier; and if the private property of the carrier, they cannot, by congressional declaration or otherwise, be made a trust fund for the United States or for any other purpose.

The power of Congress is to regulate commerce. There are many incidents of this regulation that may be exercised by Congress, but the taking of property of the carrier is not a regulation of commerce. It has no relation to the regulation of commerce, other than that it may result to a prosperous and economical carrier from a system of rates prescribed or authorized by the Commission. Sections 5 and 6 do not regulate. They take the income of the carrier already earned. They appropriate one-half of it to the government, and the other half place under a perpetual restriction that can be used only for limited purposes, and the limitations amount as much to a taking of the carrier's property as the appropriation of it direct to the government.

(A). When the appropriation of private property is the necessary effect of an act of Congress, which provides neither for compensation nor for a judicial inquiry to ascertain the damages, as is the case with Section 15a, that act and, a fortiori, all administrative orders made to enforce it, are void for repugnance to the Fifth Amendment, because lacking in due process and in provision for just compensation. The method of appropriation is immaterial. A legislative declaration of

trust which has this effect is no more effective than a legislative writ of execution or a legislative grant of land privately owned.

By paragraph (5) of Section 15a of the Interstate Commerce Act, after reciting the impossibility of establishing uniform rates upon competitive traffic which will adequately sustain all of the carriers engaged in that traffic without enabling some of them to receive an income substantially in excess of an alleged fair return upon the value of the property, the Congress declared:

"That any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States."

In the succeeding paragraph it was provided that:

"One-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission. * * *"
(41 Stat. 489.)

We have, then, a declaration by the Congress that, upon certain conditions, (the receipt by a carrier subject to the act of a so-called excessive return under rates fixed by the commission at such figure as to enable all such carriers as a whole to earn the so-called standard return of 6 per cent.) a prescribed portion of such excess shall be deemed to be held in trust for the use and benefit of the United States; the trust to be terminated by payment to the beneficiary within a stated period, as provided in paragraph (6).

At the outset it may be remarked that this is a most unusual and most uncertain sort of a trust. A trust as ordinarily understood must, in order to be valid, attach to definite and specific property; must attach at a fixed time and be created for the benefit of the owner or his nominees. But here, until the books are closed for the year, no one can tell whether any trust exists.

Assume that a railroad reaches the 15th day of December with an aggregate net return of exactly 6 per cent. upon the value of its property. If that railroad during the remainder of the year earns its expenses, no more, no less, the rates for the first 11 1-2 months of the year were just and reasonable, according to those who would sustain the validity of this act as a rate fixing measure, and no trust exists. But, if the carrier happens to earn some additional net income during the last half of December, it is assumed that the public has been subjected to the assessment of extortionate rates, and that the net earnings are, in part, impressed with a trust for the benefit of the United States representing the public, notwithstanding the rates in effect during the last half of the month may have been precisely the same rates which were in effect during the remainder of the year; the conditions of transportation the same and the additional earnings brought about solely by reason of unusually efficient management or by some fortuitous event.

It must be observed that the trust is not impressed in such case upon the revenues derived in the last 16 days of the year, but upon the net income of the carrier *for the entire year* to the extent that it exceeds 6 per cent. of the value of the property.

In the case assumed, the manager of the property might be enabled, in the exercise of entire good faith and wise discretion, either to avoid a trust or to cause it to attach, by increasing his operating expenses through the medium of additional, but not unwise or dishonest, maintenance, or by deferring his maintenance charges to an extent not sufficient to cause a material injury to the property. But however lacking this trust may be in the qualities of an ordinary equitable trust, the essence of it, so far as concerns the owner of the property, is the requirement that within four months after the close of the year it must be terminated by a delivery of the trust property to the beneficiary. This has been said to be the simplest form of a legislative act lacking in due process, viz., one by which the property of one man is taken from him by legislative edict and title thereto vested in another.

It is well, at this juncture, to call attention to some loose expressions appearing in the act, which have crept more or less unnoticed into the public press and the public thought. The act refers to an income *in excess of a fair return upon the value of the property* devoted to the public service, but, as will be shown later, this income so far as the appellant is concerned, was earned upon a level of rates fixed by the State and Federal Commissions in the exercise of their power to prescribe *reasonable rates*.

The thought has evidently been that it is improper for a carrier to earn a large return upon the original cost or reproduction cost of its physical property, without respect to the inherent reasonableness of each charge collected for each service performed. But it has been often

held, as shown by the cases cited in this brief, that cost is no measure of value, and that value, which is the property protected by the Constitution, depends more largely upon productiveness and earning power.

But to return to the trust theory, whence comes the power of Congress to make this declaration of trust? The power is defended on the proposition that it is only a part of the machinery for fixing rates. It is said that there are two methods of fixing rates; one, by way of prophesy whereby the rate-fixing power, looking into the future and exercising its discretion, estimates what basis of rates will thereafter be just and reasonable; the other, historical, accurate and scientific, by which a provisional basis of rates is established in advance, sufficiently high to be just in any event to the utility, and is later adjusted in the light of the actual income derived from the business actually done. It is contended that this latter method is the one which has been employed in Section 15a. Such, obviously, is not the case. Although the subject will later be discussed more fully it may be pointed out here that the excess is not to be returned to the persons who paid and bore the excessive provisional charges; and the act itself does not authorize the provisional charges to be excessive, but directs that they be fixed by the Commission "in the exercise of its power to prescribe just and reasonable rates." It is perhaps trite to remark that rate regulation can not be indulged in to enrich the treasury of the government. Rate regulation, as it has been practiced in this country, is in theory at least, designed to protect shippers from unreasonably high rates and to protect carriers from unreasonably low rates. The theory that

Section 15a merely amounts to a method of fixing rates, does not harmonize with either of those purposes.

We are, therefore, forced to return to the original statement that Congress in this act has directed the railroads to deliver a part of their private property to one of the agencies of the government. Whether the law is valid because this is to be accomplished through the medium of this statutory declaration of trust would seem to be a question easily solved. The Fifth Amendment provides broadly that no person shall be deprived of property without due process of law; nor shall private property be taken for public use without just compensation. As the court said in *Hurtado v. California*, 110 U. S., 516, 28 L. Ed. 232, 237:

“The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; * * * The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

“In this country different Constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. *They are limitations upon all the powers of government, legislative as well as executive and judicial.* * * *

“Applied in England only as guards against ex-

ecutive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation." (*Italics ours.*)

By the Fifth Amendment Congress is therefore prohibited from taking private property without due process of law and without just compensation, whatever the means or the method.

Numerous cases have been before this court in which it has been held either that the law was invalid because its enforcement would deprive persons of their property without due process of law or that private property has been taken so as to create the obligation to pay just compensation. It is unnecessary to review any of those cases for the present purpose, but it may be said without fear of contradiction that no matter what the circumstances, no matter what the method employed, no matter what means were adopted, and no matter what the purpose to be served, this court has uniformly held in every case that its concern was only whether there was *an actual taking of the property*. Whenever it was determined that private property would be taken without due process of law, this court has prevented it, and whenever this court has determined that private property had been taken without just compensation it has either nullified the taking or made due provision for the payment of damages.

(B). The general level of rates, State and Interstate, under which appellant's earnings accrued to it between March 1, 1920, and December 31, 1921, must be assumed to be just and reasonable and may not be assumed to be excessive.

The manner in which this level of rates came to be fixed is described in appellant's Exhibit No. 5, as follows:

"So far as the railway operating revenues of said company were derived from intrastate transportation conducted wholly within the State of Texas, they were based upon rates established, promulgated or approved either by the Railway Commission of Texas or by the Interstate Commerce Commission, as evidenced by the following statement. Prior to the orders of the Interstate Commerce Commission in the case of *Railroad Commission of Louisiana v. Aransas Harbor Terminal Railway Company, et al.*, 48 I. C. C., 312, and *Railroad Commission of Louisiana v. St. Louis Southwestern Railway Company et al.*, 23 I. C. C. 31, 34 I. C. C. 472, commonly referred to as the Shreveport Case, the order in connection with the report published in 48 I. C. C., 321, being dated January 22, 1918, all of the transportation conducted intrastate in the State of Texas was conducted at rates established and promulgated by the Railroad Commission of Texas. In its said order of January 22nd, 1918, Docket No. 8418, the Interstate Commerce Commission prescribed or approved rates upon all classes and commodities, except a few commodities to be below mentioned, for application to intrastate traffic by railroad within the State of Texas. Rates upon the few commodities excepted from the order of the Interstate Commerce Commission in said proceeding had been agreed upon between the complainant, the carriers, representative shippers and the Railroad Commission of Texas, and were promulgated by an order of the Railroad Commission of Texas, and were for that reason excepted from the order of the Interstate Commerce Commission. Effective June 25, 1918, a general increase in rate, including all rates applicable to intrastate traffic in Texas, became effective by order of the Director General

of Railroads of the United States, averaging approximately 25 per cent., and later the intrastate rates within the State of Texas were further increased by approximately 35 per cent. under the order of the Interstate Commerce Commission in Ex Parte 74, Increased Rates 1920, 58 I. C. C., 220, the order in the proceeding last mentioned being dated July 29, 1920, and took effect on August 26, 1920.

"Application was promptly made after the decision of the Interstate Commerce Commission in the proceeding last mentioned to the Railroad Commission of Texas for an express order authorizing the increase of the intrastate rates within the State of Texas to the level approved and directed by the Interstate Commerce Commission in said proceeding. This order was refused by the Railroad Commission of Texas which authorized an increase of 33 1-3 per cent. instead of the 35 per cent. authorized by the Interstate Commerce Commission. The Texas carriers thereupon increased the classes and commodities involved in the above mentioned Shreveport Case 35 per cent., but only advanced the rates on those commodities which had been excluded from the order in the Shreveport case 33 1-3 per cent. All the foregoing has reference to freight rates. Up to the time of the decision by the Interstate Commerce Commission in Ex Parte 74, the passenger rates in Texas had, except in a few instances relating to party and excursion rates and the like, been 3 cents per mile as fixed by Article 6618 of the Revised Statutes of Texas of 1911. The said order of the Interstate Commerce Commission authorized and approved an increase of passenger rates in the State of Texas to 3.6 cents per mile and also authorized a surcharge, to be collected from passengers riding in sleeping, parlor or chair cars equal to 50 per cent of the sleeping car fare, parlor car fare or chair car fare. The application of the Texas carriers to the Railroad Commission of Texas, next above referred to, also requested au-

thority to increase the passenger rates to the levels just mentioned and this part of the application was also refused by the Railroad Commission of Texas.

"Thereupon, the principal Texas carriers instituted a proceeding before the Interstate Commerce Commission, No. 11764 upon the docket of said Commission, charging that the failure of the Railroad Commission of Texas to authorize the same increases in intrastate rates in Texas as had been authorized by the Interstate Commerce Commission in Ex Parte 74, and the resulting discrepancy in the rates, intrastate as compared to interstate, constituted a discrimination against interstate commerce which the Interstate Commerce Commission was requested to order removed. On February 12, 1921, the Interstate Commerce Commission issued its report and order in said proceeding, 60 I. C. C., 421, finding that the discrimination charged did in fact exist and directing its removal and prescribing the same rates, fares and charges for application to intrastate traffic and travel in Texas as had been authorized for the group in which said State is located in Ex Parte 74, and the rates, fares and charges so prescribed, except in some minor and negligible instances, where expressly authorized by the Interstate Commerce Commission, continued to be charged upon intrastate freight and passenger traffic in Texas during the remainder of the year 1921.

"The revenue derived by Dayton-Goose Creek Railway Company between March 1, 1920, and December 31, 1921, from interstate and foreign traffic, was derived and earned on account of the transportation of traffic which, for the purposes of this affidavit, may be divided into two classes: (a) traffic upon which rates had been prescribed or approved by express orders of the Interstate Commerce Commission. All interstate traffic covered by the orders of the Interstate Commerce Commission in the Shreveport Case cited above, and all interstate traffic upon which the Interstate Commerce

Commission had fixed rates in specific complaints are instances of this class of traffic. (b) Traffic which moved upon rates, the basis of which have been in existence for many years without substantial and successful attack.

"The basis of the greater part of these rates had been in effect to and from points in Texas for many years and in my opinion these rates, taken as a whole, were reasonable. This opinion of mine is based not only upon my traffic experience in connection with those rates but also upon the presumption that rates which have been in existence during a long period of time are presumptively reasonable. See *Gamble-Robinson Commission Co. v. St. L. & S. F. R. R. Co., et al.*, 19 I. C. C., 114, *Commercial Club of Omaha v. Southern Pacific Company et al.*, 20 I. C. C., 631." ((R. 59-61.)

Counsel for the Commission has questioned the correctness of the statement in the petition that in Ex Parte 74, the Commission "fixed" rates and it is contended that the increases in rates which followed that proceeding were merely "authorized" by the Commission. Under the law, Section 15a, paragraph (2), it is made the duty of the Commission to "initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance * * * earn * * * a fair return." It being the affirmative duty of the Commission under this mandate to fix rates by initiating them or by establishing or adjusting them and the carriers having before them the thought that unless their management was efficient they would not be entitled to earn the full amount which

the act fixes as a fair return, candor would seem to compel the view that for all practical purposes these rates were absolutely fixed by the Commission subject to the obligation of the carriers to correct maladjustments.

But for our purpose it would seem to make no difference whether the rates were fixed or were merely authorized because in either event they must have received the express approval of the Interstate Commerce Commission and under all of the authorities commencing with the case of *Texas & Pacific Railway Company v. Abilene Cotton Oil Co.*, 204 U. S., 426, 51 L. Ed. 553, 27 Sup. Ct. Rep., 350, the discretion of the Commission with respect to such administrative matters is not subject to review by the courts.

Furthermore, it would appear that the very paragraph of the law under which the Commission acted in issuing its order in Ex Parte 74 (Section 15a, paragraph 2) gives the complete, definite and final answer to any contention that the rates fixed by the Commission in that proceeding were excessive or unreasonably high.

Under that paragraph of the law the Commission is directed to so initiate, modify, establish or adjust rates "*in the exercise of its power to prescribe just and reasonable rates.*" Whence does this power to prescribe just and reasonable rates arise?

By the first paragraph of Section 12 the Commission is authorized and required to enforce the provisions of the Interstate Commerce Act. Under Section 1 it is made the duty of every common carrier subject to the act to provide transportation; to establish just and rea-

sonable rates, fares and charges; to provide through routes and just and reasonable rates and charges applicable thereto and to fix just and reasonable divisions thereof; to establish just and reasonable classifications; and every unjust and unreasonable charge, rule, regulation, classification and practice is prohibited and declared to be unlawful. Sec. 2 defines and prohibits unjust discrimination, and Sec. 3 prohibits the giving of any undue or unreasonable preference or advantage. By Section 15 the Commission is expressly vested with the power, after hearing, "to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged * * * and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist."

Without attempting to trace through the act all of the powers of the Commission, it is obvious that this mandate to fix rates in the exercise of its power to prescribe just and reasonable rates, must be read in the light of the other portions of the Interstate Commerce Act. What was said by the court in *Texas v. Eastern Texas Railroad Company*, 258 U. S. 204, 42 Sup. Ct. Rep., 281, is plainly applicable here:

"Although found in the Transportation Act these paragraphs are amendments of the Interstate Commerce Act and are so styled * * * Being amendments of the Interstate Commerce Act they are

to be read in connection with it and with other amendments of it."

It was never suggested prior to the passage and approval of the Transportation Act that the power of the Interstate Commerce Commission to fix just and reasonable rates involved the power to fix excessive rates, but counsel now assert that the rates fixed are excessive although under paragraph (2) of Section 15a the power to adjust, initiate, or fix the rates under which these alleged excess earnings are to be collected is *the same power* which the Commission had previously exercised with respect to specific rates.

Far from being excessive it is in proof here that the rates fixed by the Commission in Ex Parte 74 fell far short, so far as the Western District is concerned, of the standard set by law. From the affidavit of Dr. Julius H. Parmelee, Director of the Bureau of Railway Economics (Appellant's Exhibit No. 3, R. 45-49), it appears that, taking the carriers of the Western Group or District as a whole, the rate of return on their book value was approximately 1.44 per cent. for the last ten months of 1920 and approximately 3.41 per cent. for the year 1921. Yet the law required the Commission to so establish the rates that carriers as a whole in each group should earn a fair return, which for a two-year period commencing March 1, 1920, was fixed by paragraph 3 of Section 15a at "a sum equal to five and one-half per centum of such aggregate value, but may in its discretion add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision, in whole or in part, for improvements, betterments or equipment which according to the accounting

system prescribed by the Commission are chargeable to capital account."

So far as rates may be involved which were fixed by the Railroad Commission of Texas, it is entirely sufficient to remark that under Article 6654 of the Revised Statutes of Texas of 1911 the Texas Commission "shall have power and it shall be its duty to fix to each class or subdivision of freight a reasonable rate," and the adult Texas passenger fares were fixed at three cents per mile by Article 6618 of the Texas Statutes. Article 6656 of the Revised Statutes of Texas, 1911, reads as follows:

"In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations and classifications prescribed by said commission before the institution of such action shall be held conclusive, and deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for that purpose in the manner prescribed by Articles 6657 and 6658 of this chapter."

We submit therefore that every consideration compels this court to view the rates, fares and charges under which the appellant earned the income shown on the reports involved in this case as non-excessive, and that there is no basis of law or fact upon which court or counsel may predicate an assumption that the rates upon which this income was earned contained any excess whatsoever above what was just, fair and reasonable, except perhaps in those instances where the shippers who paid the rates are entitled under the Interstate Commerce Act to secure from the Interstate Commerce

Commission an order of reparation requiring the carrier to refund to the party damaged any excess which the Commission may find to have existed. Even here we must not overlook the proposition firmly established by *Texas & Pacific Railway Company v. Abilene Cotton Oil Company, supra*, that the questions of whether any excess did exist, and if so how much it was, have by law been committed exclusively to the determination of the Interstate Commerce Commission, and that until the Commission speaks on this subject in a proceeding where its powers are properly called into play, neither this court nor any other court has power to enter upon a consideration of either of those questions.

All States, or substantially all, have public utility Commissions, charged with the duty of representing the public, and of seeing, insofar as the States may exercise that power, that every individual rate and every system of rates upon every railroad serving the State is reasonable as between the public and the carrier. How well and diligently these duties have been prosecuted is evidenced by the fact that the reports, State and national, are filled with cases where such questions are involved, either by actions on the part of regulatory bodies to compel carriers to reduce rates, or on the part of carriers to resist reductions.

In addition to this, the Interstate Commerce Act further provides machinery by which every shipper, every community of shippers, every body of organized shippers representing any special interests in the commerce of the country, every organization, corporate or voluntary, every city and town and every community, may have its action against all of the railroads of the coun-

try in a single proceeding to determine the reasonableness of rates upon any given commodities, or to remove discriminations between localities, or to test any other rate, classification or adjustment which, in the opinion of the complaining parties, operates against their interest. The books are full of cases of proceedings of this character, and an army of examiners is engaged in gathering facts for the Commission upon which to determine complaints, and the Commission is constantly engaged in granting or refusing relief therein.

But this is not all. If any shipper believes, when he ships any commodity by rail in interstate commerce, that the rate is too high, ample and sufficient legal machinery is provided under which he may not only test that rate and have a proper rate fixed for the future, but if the question be determined in his favor, he may secure an order of reparation and recover back the full amount of the unwarranted exaction. That shippers have for years been availing themselves of these provisions of the act is evidenced by even a casual examination of the Commission's reports and the decisions and dockets of the Federal Courts.

Consequently, it seems indisputable that the old rule that rates are presumed to be reasonable until the contrary is affirmatively made to appear is greatly reinforced through the constant, active and militant efforts of shippers and public utility commissions, throughout the country, to reduce these rates to the lowest possible level.

(C.) The restrictions placed by Section 15a upon the use of the moneys thereby required to be placed in a reserve fund constitute a taking of property under the

Fifth Amendment, because an undue limitation upon the use of property is equivalent under the Constitution to a seizure of the property.

By the provisions of Section 15a a reserve fund is required to be built up out of one-half of the excess earnings until it equals 5 per cent of the value of the carrier's property devoted to the service of transportation, and this fund, under the terms of the act, may be used only for certain limited and restricted purposes. Paragraph (7) of said Section reads as follows:

“For the purpose of paying dividends or interest on its stocks, bonds or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for one year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.”

In *Branson v. Bush*, 251 U. S., 182, 64 L. Ed. 215, 219, the court quoted with approval the following excerpt from the opinion in *C. C. C. & St. L. R. Co. v. Backus*, 164 U. S., 439, 38 L. Ed. 1041, 1046:

“The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put, and varies with the profitableness of that use present and prospective, actual and anticipated. *There is no pecuniary value outside of that which results from such use.*”

The same principle is illustrated in *Brooks-Scanlon Lumber Company v. Railroad Commission*, 251 U. S., 396, 64 L. Ed. 323, in which the court held that a State Railroad Commission could not require a lumber company to continue to operate a railroad at a loss, saying:

“The plaintiff may be making money from its sawmill and lumber business, but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it.”

In *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557, Justice Miller, speaking for the court, said:

“It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the use of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.”

The view expressed in that case was approved in *Kansas Natural Gas Company v. Haskell*, 172 Fed. 545, which was affirmed by this court as *West v. Kansas Natural Gas Company*, 221 U. S., 229, 55 L. Ed. 716. In that case it was held that the Oklahoma Statute, which prevented the removal of natural gas out of the State where it was produced, so interfered with the use and disposition of the property held in such gas by the owners thereof that the statute amounted to a taking of such property without due process of law and was therefore unconstitutional and void.

The decision of the case in this court was based mainly upon the proposition that the act constituted an interference with interstate commerce; but, that the court did not overlook the further fact that it was invalid because, in violation of the Fourteenth Amendment, by its interference with the use and disposition of property, it would operate to deprive the owner of such property without due process of law, is evidenced by the following brief quotation from the opinion:

"We have reviewed the cases at length, as they demonstrate the unsoundness of the contention of appellant, based upon the right to conserve * * * the resources of the State, and that the statute finds no justification in such purpose for *its interference with private property* or its restraint upon interstate commerce." (Italics ours.)

Again, at page 254, the court said, that the Statute which was held invalid "does not alone regulate the right of the reduction to possession of the gas, but, when the right is exercised, when the gas becomes property, takes from it the attributes of property—the right to dispose of it." * * *

In *St. Louis v. Hill*, 22 S. W. 861, the Supreme Court of Missouri said:

"This contention brings into prominence the true import of the word 'property.' The general result of various definitions of the term is that it is the exclusive right of any person to freely use, enjoy, and dispose of any determinate object, whether real or personal. 1 Bl. Comm. 138; 2 Aust. Jur. 817, 818; 19 Amer. & Eng. Enc. Law, 284, and cases cited; Lewis, Em. Dom., Secs. 57-59; *Eaton v. Railroad Co.*, 51 N. H. 504; *Thompson v. Improvement Co.*, 54 N. H. 545; *Wynehamer v. People*, 13 N. Y. 378. Sometimes the term is applied to the thing itself, as to a horse or a tract of land. These things however, though subjects of property, are, when coupled with possession, but the indicia, the visible manifestations of invisible rights, 'the evidence of things not seen.' Property, then, in a determinate object, is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and disposal of that object. It follows from this premise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction *pro tanto* of property."

That was a case in which the court declared invalid an ordinance establishing a building line on a boulevard. The effect was that the owner of a lot, which was not actually taken, was prohibited from building upon a portion of his land and was thereby deprived of its ordinary use without any proceedings for the condemnation of that part of the lot, the use of which was prohibited. Substantially the same conclusion was reached by the Supreme Court of Texas in *Spann v. City of Dallas*, 235 S. W., 513, 516, in which a city ordinance, prohibiting the erection of a business building in a residence

district and thus limiting the use of property, was declared unconstitutional.

The Supreme Court of Georgia in *Carey v. Atlanta*, 143 Ga. 192, 84 S. E. 456, quoting from *State v. Darnell*, 166 N. C. 300, 81 S. E. 338, said:

“The *jus disponendi* has always been held one of the inalienable rights incident to the ownership of property, which no statute will be construed as having power to take away.”

To the same effect is *Chicago, Milwaukee & St. Paul R’y Co. v. Minnesota*, 134 U. S., 418, in which it was declared that:

“If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, *in substance and effect, of the property itself*, without due process of law and in violation of the Constitution of the United States.” (Italics ours.)

In *United States v. Cress*, 243 U. S. 316, 61 L. Ed. 746, 753, 754, the court said:

“It is the character of invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking,”

and, quoting from the opinion of Mr. Justice Brewer in *United States v. Lynah*, 188 U. S., 445, 47 L. Ed. 539, 538, the court further said:

“While the government does not directly proceed to appropriate the title, yet it takes away the use

and value; and when that is done it is of little consequence in whom the fee may be vested."

The court, after concluding this quotation, continued:

"There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his title to the land."

By paragraph (7) of Section 15a the carrier is prohibited from drawing upon this reserve fund, except for the purpose of paying interest or dividends upon its securities or rent for leased roads, and may not draw upon it for those purposes except "to the extent that its net railway operating income for one year is less than a sum equal to six per cent. of the value" of its railroad property. If the carrier be fortunate enough to continue to earn at least six per cent. upon the value of its property, the plain effect of this part of the act is to place this reserve fund of the carrier (which is concededly the private property of the carrier, which no one claims as the proceeds of any tax or as the subject of any trust) in a kind of financial cold storage, from which the owner is not permitted to withdraw it except for certain limited and specific purposes and then only upon condition that the carrier's earnings for the year fall below six per cent. of the values of its property. No matter how great the need for additional power or equipment, this fund can not be resorted to for that purpose. Even if the revenues of the carrier fall so low

in subsequent years as to create a deficit, not a single tie can be bought with this reserve fund, not a yard of ballast, and not a ton of coal. The property may be going to ruin for lack of maintenance, the current earnings may be wholly insufficient to provide that maintenance and yet this reserve fund, equal to five per cent of the value of its entire property, could not be employed, if this act is valid, to relieve the company's distress.

Even if it should be said, therefore, that it is within the province of Congress, under its power to regulate commerce, to provide against the financial embarrassments of the future by requiring that a part of the prosperity of the present be set aside in a reserve fund, that contention could not justify the severe and stringent limitations imposed here upon the use of private property. The purposes for which the reserve fund may be drawn upon, are fixed in such an arbitrary way they have so little connection with the real exigencies which the business may develop, and are so wholly lacking in reasonable basis for classification that they cannot be said to be even remotely related to any of the provisions of the "due process" clause, which requires equal and impartial legislation and prohibits all arbitrary, tyrannical and capricious legislative action.

(D.) The "due process" clause of the Fifth Amendment requires equal legislation affecting generally and in like manner all those in similar circumstances, and to this extent the Fifth Amendment, which does not expressly contain an equal protection clause, is as broad as the Fourteenth Amendment, in which the principle is expressly stated.

Taylor, in his work on "*Due Process*," Section 134, says:

"Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requirement is satisfied."

"The primary purpose of the founders of American constitutional law was to wipe out the entire system of legislative despotism over life, liberty and property, based in England not only upon a denial of the right of due process, but also upon the denial of the principles demanding generality and equality in the laws. Their effort was, first, to subject all state power—executive, legislative and judicial—to the yoke of constitutional limitations consisting of epitomies of English constitutional law as it existed in 1776; *second*, to further limit the legislative power with the requirement that all laws must be equal and general. The end in view has been thus expressed in *Sears v. Cottrell*, 5 Mich. 251: 'By the law of the land we understand laws that are general in their operation, and that affect the rights of all alike, and not a special act of the legislature, passed to affect the rights of an individual against his will and in a way in which the same rights of other persons are not affected by existing laws. Such an act, unless expressly authorized by the Constitution, or clearly coming within the general scope of legislative power, would be in conflict with this part of the Constitution, and for that reason, if no other, be void.' "

"It was easy enough to give scientific definition to the new American ideal of equal laws. The practical difficulty has been to convert that ideal into a working rule capable of application to existing conditions. In practice it has been necessarily modified by two important exceptions: *First*, where the State Constitution does not expressly limit the power of the legislature to pass special or local laws

(see *Waite v. Santa Cruz*, 184 U. S. 302), it may pass laws confined in their operation to particular localities without offending against the constitutional limitation in question; *second*, in the language of *Giozza v. Tiernan*, just cited, 'Nor in respect of taxation was the amendment intended to compel the State to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one against another class. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232; *Home Ins. Co. v. New York*, 134 U. S. 594; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339. And due process of law within the meaning of the amendment is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government. *Leeper v. Texas*, 139 U. S. 462.'

"Such, then, is the nature of the fundamental requisite of due process, so far as generality and equality of laws is concerned, which, with its inevitable exceptions, is an element inherent in due process in its American form. As such it existed long before the adoption of the Fourteenth Amendment, and is therefore something entirely separate and apart from the guaranty embodied in its provision that no State shall 'deny to any person within its jurisdiction the equal protection of the law.' "

In *Leeper v. Texas*, 139 U. S. 462, 35 L. Ed. 225, 227, the court said:

"Law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of

powers of government unrestrained by the established principles of private right and distributive justice."

In *Giozza v. Tiernan*, 148 U. S. 657, 37 L. Ed. 599, 601, the court said:

"Due process of law within the meaning of the (14th) Amendment is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

In *Cass Farming Co. v. Detroit*, 181 U. S. 396, 45 L. Ed. 914, 916, the court said:

"We have recently held that it was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation; that that amendment legitimately operates to extend to the citizens and residents of the States *the same protection against arbitrary State legislation affecting life, liberty and property as is afforded by the Fifth Amendment against similar legislation by Congress*, and that the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State applicable to all persons in like circumstances and conditions, but only when there is some abuse of law amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood v. Baker*, *French v. Asphalt Paving Co.*, 181 U. S. 324 ante, 879, 21 Sup. Ct. Rep. 625; *Tonawanda v. Lyon*, 181 U. S. 389, ante, 908, 21 Sup. Ct. Rep. 609; *Wight v. Davidson*, 181 U. S. 371, ante, 900, 21 Sup. Ct. Rep. 616." (Italics ours.)

In *Tonawanda v. Lyon*, 181 U. S. 389, 45 L. Ed. 908, 911, the court said:

"The purpose of that amendment (14th) is to extend to the citizens and residents of the States the same protection against *arbitrary* State legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress." (*Italics ours.*)

In the *Commodities Clause Cases*, 213 U. S. 366, 53 L. Ed. 336, 29 Sup. Ct. Rep. 527, the contention was made that the commodities clause of the Interstate Commerce Act was void because it created a discrimination by excepting the transportation of lumber and forest products from its operation. Without comment or argument upon the reason for the ruling, Chief Justice, then Mr. Justice White said:

"Without elaborating, we hold the contention that the clause under consideration is void because of the exception as to timber, and the manufactured products thereof, is without merit. Deciding as we do, that the clause, as construed, was a lawful exercise by Congress of the power to regulate commerce, we know of no constitutional limitation requiring that such a regulation, when adopted, should be applied to all commodities alike."

Whether this ruling was based upon the proposition that there is no equal protection clause in the Fifth Amendment or upon the proposition that the exception referred to was the result of a reasonable distinction or discrimination is not expressly stated, but if the ruling had been pitched upon the first ground mentioned that answer would have been so simple, so conclusive and of such far-reaching scope that it seems reasonable to assume that it would have been expressly rested on that ground.

In *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 60 L. Ed. 493, 36 Sup. Ct. Rep. 236, 244, the income tax law of 1913 was attacked. One of the objections made was that the law created a discrimination by reason of the progressive rates and the provisions for deductions. Chief Justice White, in delivering the opinion of the court, stated that as a general rule the due process clause of the Fifth Amendment is not a limitation upon the taxing power of Congress. He then continues:

“And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property; that is, a taking of the same in violation of the Fifth Amendment; or *what is equivalent thereto*, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.” (Italics ours.)

In *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755, 776, the court dealt with an act of Congress commonly known as the Adamson eight-hour law. The Chief Justice delivering the majority opinion stated that one of the contentions was that the act in effect denied the equal protection of the laws. If the “due process” clause of the Fifth Amendment did not contain within itself the essence of the equal protection clause of the Fourteenth Amendment, a statement to that effect would have been the easiest and most direct answer to this contention. However, that answer was not given, but the Chief Justice said:

"The want of equality is based upon two considerations. The one is the exemption of certain short line and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions. The second rests upon the charge that unlawful inequality results because the statute deals not with all but only with the wages of employes engaged in the movement of trains. But such employes were those concerning whom the dispute as to wages existed, growing out of which the threat of interruption of interstate commerce arose,—a consideration which establishes an adequate basis for the statutory classification."

In no case have we been able to find any intimation by the court to the effect that the inhibition of the Fifth Amendment against the taking of property without due process of law is not broad enough to prevent an arbitrary classification, which if made by a State would be a violation of the declaration of the Fourteenth Amendment that no person shall be deprived of the equal protection of the laws. On the contrary, whenever this court has had occasion to discuss the subject, it has uniformly held that the purpose and effect of both amendments are in this respect the same. It seems obvious, therefore, that if the classification made by this act would have been invalid under the Fourteenth Amendment, had the act been that of a State legislature, the same conclusion must be reached because of the limitations imposed by the Fifth Amendment upon the powers of Congress. The act in question, so far as it requires payments of money to the Interstate Commerce Commission and into the reserve fund to be established and maintained by the carrier, applies only to carriers having net incomes in excess of a certain percentage upon

the value of their property, and the classification is, therefore, one based directly upon the profitableness of the business, without regard to the propriety of the charges made for each service rendered.

(E.) A classification of carriers, for rate-fixing purposes, solely upon the basis of the net earnings of such carriers for performing a similar service under like conditions in the same territory, is arbitrary and unequal, and therefore takes property without due process, in violation of the Fifth Amendment.

In *Cotting v. Godard*, 183 U. S. 79, 46 L. Ed. 92, Mr. Justice Brewer, who delivered the opinion of the court, discussed this very question in an exhaustive way. In that case, an act of the Kansas legislature was attacked, by which the rates of stockyards, having average daily receipts in excess of certain specified quantities of live stock, were regulated. There was no regulation of the rates and charges of stockyards having average daily receipts less than the quantity specified. The classification, in other words, was based directly upon the volume of the business. The opinion is, in part, as follows:

"The express and only basis of classification is in the amount of business done between two classes. As evidence that we are right in our construction, we may refer to the brief of the learned attorney general, in which he says:

"* * * Another reason why the classification should be based upon the volume of business done is that rates which are reasonable and proper and furnish a sufficient return upon the capital invested can very properly be made lower and different in a plant where the volume of business is

large, while in a smaller plant, doing a small volume of business, higher rates may be necessary in order to afford adequate returns.'

"If the average daily receipts of a stockyard are more than 100 head of cattle, or more than 300 head of hogs, or more than 300 head of sheep, it comes within the purview of this statute. If less than that amount, it is free from legislative restriction. No matter what yards it may touch today or in the near or far future, the express declaration of the statute is that stockyards doing a business in excess of a certain amount of stock shall be subjected to this regulation, and that all others doing less business shall be free from its provisions. Clearly the classification is based solely on the amount of business done, and without any reference to the character or value of the services rendered. Kindred legislation would be found in a statute like this: requiring a railroad company hauling ten tons or over of freight a day to charge only a certain sum per ton, leaving to other railroad companies hauling a less amount of freight the right to make any reasonable charge; or, one requiring a railroad company hauling 100 or more passengers a day to charge only a specified amount per mile for each, leaving those hauling 99 or less to make any charge which would be reasonable for the service; or if we may indulge in the supposition that the legislature has a right to interfere with the freedom of private contracts, one which would forbid a dealer in shoes and selling more than ten pairs a day from charging more than a certain price per pair, leaving the others selling a less number to charge that which they deemed reasonable; or forbidding farmers selling more than ten bushels of wheat to charge above a specified sum per bushel, leaving to those selling a less amount the privilege of charging and collecting whatever they and the buyers may see fit to agree upon. In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but simply on the amount

of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits his charges may be cut down."

A classification, not based upon the character or value of the services rendered, but simply on the amount of business done, had previously been discussed in the same opinion, where it was said:

"The State's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day, and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because by reason of the multitude the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. He has a right to do business. *He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large.* Such was the rule of the common law, even in respect to those engaged in a quasi-public service, independent of legislative action. If any action to recover for an excessive charge, prior to all legislative action, who ever knew of any inquiry as to the

amount of the total profits of the party making the charge? Was not the inquiry always limited to the particular charge, and whether that charge was an unreasonable exaction for the services rendered? As said by Mr. Justice Bradley in *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 699, 27 L. Ed. 584, 587, 2 Sup. Ct. Rep. 732:

“‘It is also obvious that, since a wharf is property and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf, and are required to pay the regular charges therefor; provided, always, that the charges are reasonable, and not exorbitant.’

“‘In *Canada Southern R. Co. v. International Bridge Co.* (L. R. 8 App. Cas. 723, 731), Lord Chancellor Selborne thus expressed the decision of the House of Lords:

“‘It certainly appears to their lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their lordships asked counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and

the benefit to the person receiving that service, perfectly unexceptionable according to any standard of reasonableness which can be suggested. That being so, it seems to their lordships that it would be a very extraordinary thing, indeed, unless the legislature had expressly said so, to hold that the person using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to 15 per cent. Their lordships can hardly characterize that argument as anything less than preposterous.'

"The authority of the legislature to interfere by a regulation of rates is not an authority to destroy the principles of these decisions, but simply to enforce them. Its prescription of rates is *prima facie* evidence of their reasonableness. In other words, it is a legislative declaration that such charges are reasonable compensation for the services rendered, but it does not follow therefrom that the legislature has power to reduce any reasonable charges because by reason of the volume of business done by the party he is making more profit than others in the same or other business. The question is always, not, What does he make as the aggregate of his profits? but what is the value of the services which he renders to the one seeking and receiving such

services? Of course, it may sometimes be, as suggested in the opinion of Lord Chancellor Selborne, that the amount of the aggregate profits may be a factor in considering the question of the reasonableness of the charges, but *it is only one factor, and is not that which finally determines the question of reasonableness.*" (Italics ours.)

The application of the principles so forcibly stated by Justice Brewer is apparent. The government did not undertake to guarantee a fixed income to any railroad beyond the readjustment period of six months. Congress directed that the Commission should divide the country into groups and should fix reasonable rates for each group that would produce five and one-half per cent. upon the reasonable value of the carrier property in the group, plus not exceeding one-half of one per cent. in its discretion, for betterments. The Commission was not limited as to groups and might have created as many as it thought necessary. Its action in establishing the groups defined in its opinion in *Ex Parte 74 (Increased Rates 1920, 58 I. C. C., 220)* is clearly an administrative discretion, which is not only not subject to review by the court but one to which this court will ascribe "the strength due to the judgment of a tribunal appointed by law and informed by experience." *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S., 441; 51 L. Ed. 1128; *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 54, 56 L. Ed. 308, 311.

Congress recognized that equal rates would not produce equal returns to every railroad in proportion to the amount invested. It did not undertake to equalize these rates as among the railroads, but provided that

the road with a net income in excess of six per cent of the value of its property should pay one-half of the excess to the Commission, and place and maintain the other half in a reserve fund. Of course, Congress was trying to provide for the average property, and the law is plain and clear and the direction to the Commission is the same as if the act had said that the rates should be so fixed by the Commission as that the average road in every group, by economy in management, etc., should earn six per cent, and that rates so fixed by the Commission should be held to be just and reasonable.

There is nothing in the law and nothing in the order of the Commission stating or implying any intention on the part of the government that there should be charged any unreasonable rate upon any class or commodity of traffic, or that any shipper should be required to pay more than a reasonable rate. To enforce the thought that the carriers might collect and retain nothing in excess of reasonable rates, paragraph (17) expressly declared that the provisions of Section 15a should not be construed to deprive shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates.

The rates collected and ultimately to be retained by this appellant, after it has paid all reparation orders that may be issued against it, being just and reasonable; being, in other words, fair charges for the services rendered in each case, we turn back again to find the following in the opinion of Justice Brewer in the *Stock-yards Case, supra*.

"The question thus presented is of profoundest significance. It is true in this country that one

who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife? Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits? We cannot shut out eyes to well known facts. Kansas is an agricultural State. Its extensive and fertile prairies produce each year enormous crops of corn and other grains. While portions of these crops are shipped to mills to be manufactured into meal and flour, it is found by many that there is a profit in feeding them to stock, so that the amount of stock which is raised and fattened in Kansas is large, and makes one of the great industries of the State. Now, shall they whose interests are all along the line of production, having by virtue of their numerical majority the control of legislation, be permitted to say to one who acts as an intermediary between transportation and sale, that while we permit no interference with the prices which we put upon our products, nevertheless we cut down your charges for intermediate services; and this, not because any particular charge is unreasonable, but because you are making by the aggregate of those charges too large a sum, and ought therefore to divide with us. The possibility of such legislation suggests the warning words of Judge Catron, afterwards Mr. Justice Catron, of this court, when in *Vanzant v. Waddell*, 2 Yerg., 262, 270, he said:

“Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. ~~There~~ his otherwise, odious individuals and corporate bodies would be governed by one rule,

and the mass of the community, who made the law, by another.' "

The learned justice then examined other decisions of this court and of the Supreme Court of Kansas, reinforcing his remarks, and added:

"The single matter for our present consideration is whether, in the restraint which the Legislature of Kansas has attempted to impose upon this stockyards company, it has trespassed upon those rights which by the Constitution of the United States are secured to every individual against State action. It has been more than once said judicially that one of the principles upon which this Government was founded is that of equality of rights. * * * There can be no pretense that a stockyard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra 2 head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business, while not regulating another which does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation

does not deny the equal protection of the laws we are unable to perceive what legislation would."

There can be no pretense that a railroad which earns seven per cent. is not doing precisely the same business as its competitor which earns only six per cent. The only difference is that one business is slightly more profitable than the other, but the receipt of the additional profits does not change the character of the business, and does not warrant any discrimination between the two properties or between their owners, and certainly cannot be held to warrant a requirement that the one shall pay over a part of its profits to the Government and shall place another part of its profits beyond the reach of the ordinary requirements of the business, while the other is left free to use its entire income as the managers of the business may see fit.

It has been suggested that the remarks of Justice Brewer, which have been quoted above, are mere *dicta*, and that six of the justices refused to concur in them. The statement of the six justices referred to was merely that they thought it unnecessary to express any opinion as to whether or not the statute in question deprived the company of its property without due process of law. Furthermore, these observations in the opinion of the court, from which we have quoted so largely, occupy such an important place in that opinion, and such great stress was laid upon them by the great judge who delivered the opinion, that if they had not been substantially approved by the six justices referred to it is entirely probable that a ringing dissent would have been delivered by those who thought that the due process question need not be determined.

The effect of this section, if valid, is that while two railroads lying side by side may haul equal quantities of the same commodity between the same points, at the same rate, yet if one be prosperous and well managed and earn more than six per cent. on the value of its property, and the other be so poorly operated that it earns only two per cent., the net result will be a taking by the Government of the property of one and the complete release of the other.

We have an act of Congress to consider, therefore, which constitutes a plain classification according to the business done and the profit taken from it; which is applicable only to the business which is profitable beyond a specified extent, and which bears no relation whatever to the character of the business or to the value of the service performed; and which may be applied to one railroad earning seven per cent. and not to its competitor, which earns exactly six per cent.

Has it come to pass in this country which once, at least, was free, that industry, sagacity, prudence, foresight and efficient workmanship, with their rewards, have no protection under the fundamental law? Such would inevitably seem to be the case, if, without reference to the value of the service rendered, the Congress may single out the man whose railroad, built in the right place and well manned and operated, proves prosperous, and decree that merely because of the rate of return on his investment he alone must deliver a part of his profits to the government. If ever a court was confronted with a case of arbitrary classification, without reasonable basis, your Honors have it here.

(F.) The act deprives appellant of its property without due process by reason of the entire lack of provision for adjusting the actual earnings to the earnings as shown by the books shortly after the close of the annual accounting period.

The act assailed, when applied to the actual conditions of railroad operation and the system of reports and accounting required by law and by the Interstate Commerce Commission, is void and unenforceable.

It provides that if any carrier receives for any one year a net railway operating income in excess of a fair return upon its property, one-half of the excess shall be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund.

Under the accounting rules of the Commission every railroad is compelled to close its books within three months after the end of each calendar year, and the Interstate Commerce Act requires the annual report to be filed with the Commission within three months after the end of each calendar year. The demand made upon the appellant in this case (bill of complaint, Exhibit E, R. 34, 42) was to pay for the year 1920 one-half of \$21,666.24, and for the year 1921 one-half of \$33,766.99, or \$10,833.12 for the first year, and \$16,833.49 for the second year.

The accounting system does not permit unadjusted damage claims of any kind to enter into these figures, nor can the railroad company set them up as contingencies with any assurance of the sufficiency of the estimate and carry a reserve—known certainly to be sufficient—beyond the end of the year. It is even questionable whether it may be permitted to *speculate* as to what may

be recovered by shippers on account of overcharges or what shippers may require the railroad company to pay out upon claims for reparation on account of unreasonable rates.

The rules of the Commission (Exhibits A and B in the bill, R. 19, 22) require that the report of the year's operations shall be promptly made and the ascertained amount promptly paid. The report, of course, whenever made, must be based upon the books *as closed*, and the books must be closed for each year at a time which will permit the preparation of the annual report and the transmission thereof to the Commission within three months after the end of the year.

It may be conceded that the accounting rules of the Commission authorize the setting up of a reserve to provide for the payment of operating liabilities, which are not definitely determined during the accounting year as to liability and amount, or either. It will be observed, however, upon a consideration of these accounting regulations (R. 62-64) that any balance remaining in the operating reserve at the end of the year must be *analyzed* and a report made to the Commission showing "the conditions causing the carrying forward of such balances, except as to balances applicable to personal injury or loss and damage liability, for which balances the carrier shall preserve in its files *the details upon which such estimates were based.* * * * If, on account of claims for personal injury or loss and damage being unsettled at the close of the year, the accounts for such expenses are not adjusted, the balances carried forward in the operating reserve account shall be *analyzed* as provided for in Section 20 of these instructions." (Italics ours.)

It must be borne in mind, however, that an operating reserve is a mere estimate. The estimate may readily be too low, and where the estimate is held down to details and is required to be supported by known facts, it probably will be too low. For instance, it is common knowledge that within statutory periods of limitation suits are frequently brought against railroad companies and other large concerns upon personal and death injury claims and others, particularly those sounding in tort, of which the accounting officers of the defendant were wholly unaware at the close of the accounting period during which the liability is claimed to have arisen. The mere authority, therefore, to establish a reserve, based upon an estimate, falls far short of authority to adjust the actual earnings to the book earnings, particularly when the estimate is hedged in by such limitations as those described in the rules copied above.

Assuming the correctness of the value upon which the returns of the appellant in this case were based, we have a demand at the end of 1920 for approximately \$11,000.00, and at the end of 1921 for approximately \$17,000.00. We have shown by Balderach's affidavit (complainant's exhibit No. 4, R. 49) that claims for reparation had been made by shippers on the ground that certain rates charged in 1920 and 1921 were excessive and unreasonable, the amount claimed against the appellant and its connections being over \$57,000.00, but the exact proportion, if any, to be ultimately charged against appellant being unknown. That affidavit also shows claims for loss of and damage to freight, in which appellant is liable in whole or in part, of approximately \$9,000.00, and other claims of less importance. Now, if these claims should be established in full, appellant

would be obliged to pay the claims in full out of its own property. But this law gives absolutely no enforceable claim against the Government for any refund; and if these claims in either year should equal the total amount of the so-called excess, the result would be that the railroad company had irretrievably paid to the Government one-half of the so-called excess, although it finally appeared that there was no excess in fact.

The best operated roads sometimes have very serious accidents. Suppose that in the latter days of December, 1920, some serious accident had occurred and settlements could not have been made (which would not have been unusual) before the books were closed for the year 1920, and suppose that in some subsequent year two judgments for \$30,000.00 each should be obtained and affirmed on account of deaths or serious bodily injuries. The railroad company would be compelled to pay the judgments, and the result would be that instead of having a so-called excess earning for the year 1920, the net return would be less than six per cent., or perhaps even a deficit.

It is argued that these charges are "lap-overs" and would go into the accounts for the year in which paid. This is true, but it is equally true that the year in which they are paid might be absolutely devoid of excess earnings, wholly independent of the payment of these "lap-over" judgments.

Let us take a case actually existing. Reparation claims for excessive rates (and suits for personal injuries in the Texas Courts) may be filed at any time within two years after they accrue. [Revised Statutes of Texas, 1911, Art. 5687; Interstate Commerce Act, Sec. 16, par. (3).] Balderach's affidavit shows that the pending claim for alleged excessive charges of \$57,000 ac-

crued during the two years under consideration, to wit, 1920 and 1921 (R. 49). The amount of it is still undetermined. It may be paid out in 1923, or even in 1925, and if the proportion of appellant should be great enough to absorb the entire so-called excess, the net result would be that we would have paid to the Government approximately \$28,000 in so-called excessive earnings, and would in turn have paid to the shippers some amount, as yet undetermined, on account of excessive and unreasonable rates under which the so-called excess earnings accrued, yet appellant would have no claim for refund or reparation against the Government for the return of any part of the so-called excess earnings paid to the Commission.

The statement that the Government can take the private property of a railroad company under such terms, not only shocks the judicial conscience, but it staggers judicial credulity and must try judicial forbearance.

No more violent assumption can be made, based upon the history of railroads in this country, than that a high tide of prosperity such as occurred in 1917, for instance, would necessarily be followed by a like high tide of railroad prosperity in 1919. During that year the railroads were operated by the Government, and although the rates were increased over the entire country, the Government lost hundreds of millions of dollars from the operations. It *may be* that the complainant in this case will have a prosperous year in 1923 or 1924 or 1925; but it does too much violence to the judicial conscience to ask that the validity of a law be sustained upon such an *assumption*.

Another thing that must be observed is that the so-called "lap-overs" of a railroad company seldom repre-

sent amounts due the railroad company. The nature of its business and the present requirements of the statutes [Interstate Commerce Act, Sec. 3, par. (2), 41 Stat. 479; Ex parte 73, 57 I. C. C. 591] compel it to collect all collectible revenue as the business progresses, so that at the end of the year amounts owing to it (except interline traffic balances, which normally somewhat balance each other) are practically all collected, while claims against railroads sometimes remain unadjusted, and sometimes undiscovered, for many years; and what lean year the adjustment of large claims may fall in can no more be forecasted than the amount of the final adjustment thereof can be determined in advance.

It is not impossible that a small road, with small earnings, like appellant, might in some year have so-called excess earnings, and after it had paid the Government its one-half thereof, not only the whole of the excess earnings, but all other earnings as well, might be wiped out by reparation claims of shippers on the ground that some specific rate, under which the earnings accrued, was excessive. The *quantum* of the taking, however, does not seem to be important. If the Government takes the widow's mite without compensation, the Constitution is just as clearly violated as it would have been if it had been permitted to take the Arlington Estate in the Lee case, or as if it should be permitted to take the millions of the rich.

The declaration of Mr. Justice Harlan, speaking for the court in *Sweet v. Rechel*, 159 U. S. 380, 40 L. Ed. 188, seems to be peculiarly apt:

"Much stress was placed by counsel in that case (Connecticut River R. R. Co. v. Franklin County Commissioners, 127 Mass. 50, 34 Amr. Rep. 338)

upon the admitted fact that the earnings of the railroad owned by the Commonwealth would *probably* be sufficient to meet and extinguish all claims for damages for lands taken. But that, the court well said, fell short of the constitutional requirement that the owner of property shall have prompt and certain compensation, *without being subjected to undue risk or unreasonable delay.*

"Substantially the same principles have been announced by this court when interpreting the clause of the Constitution of the United States that forbids the taking of private property for public use without just compensation. In *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 658, the court said: 'The Constitution declares that private property shall not be taken for public use without just compensation. It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. *But the owner is entitled to reasonable, certain and adequate provision before his occupancy is disturbed.* * * *

"* * * The legislature may authorize a municipal corporation to take, for public use, at the outset, the absolute title to specific private property, if either the statute under which that is done, or a general statute, recognizes *the absolute right of the owner*, upon his property being taken, to just and reasonable compensation therefor, and makes provision, in the event of the disagreement of the parties, for the ascertainment, by suit, *without unreasonable delay or risk to the owner*, of the compensation to which, under the Constitution, he is entitled and to a judgment in his favor, *enforceable against such corporation in some effective mode*, so that the owner can certainly obtain the amount of such compensation." (Italics ours.)

Substantially the same rule was laid down in the later case of *Chicago, Milwaukee & St. Paul R. Co. v. Wisconsin*, 238 U. S. 491, 59 L. Ed. 1423, 1430, in which this

court replied to the suggestion of the State Court that, if compliance with the statutory command to leave upper berths closed, unless sold, imposes additional operating costs in the conduct of the business "the defendant can readily be secured against such loss by having the rate adjusted to meet this burden." This court said:

"But if the statute is not a reasonable exercise of the police power and yet operates to take property, such taking cannot be justified on the ground that the company *may* be able to secure an increase in rates. For, without considering any other question involved, it is sufficient to say that the taking and a fixed right to compensation must coincide, though in some cases the time for payment may be delayed." (Emphasis by the court.)

In the instant case appellant is subjected to the risk of uncertainty in two respects:

We are first told that we may estimate these unadjusted claims provided our estimate be subject to analysis and be supported by details, and, if we fail to estimate the expenses sufficiently high, or if we have no knowledge of damages for which we may be liable, but for which no claims have been made and no suits have been filed, as is frequently the case, that is our misfortune.

In the second place, we are told that in whatever year these liabilities are definitely determined and payment thereof is made, the amounts so found to be due may be taken out of what would otherwise be excess income, and thus the loss will not fall on the appellant. This assumption entirely overlooks the most potential factor in the equation, which is that there may not be for that year, nor for any subsequent year, any excess earnings against which to charge these losses when they occur.

Reparation claims are most frequently long drawn-out and are not determined for many years in many cases, but the Congress did not intend that there should be any mistake about the right of the shipper to enforce his claim for reparation, and therefore paragraph 17 of Section 15-a expressly provides that the provisions of the section "shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates."

By failing to provide any means whereby the carrier could have or enforce any reciprocal claim against the Government, Congress made it equally plain that the carrier should have no "reparation" against the Government in cases where "excess earnings" according to the books were paid over and subsequent developments proved that the books did not reflect the facts.

In other words, the declaration of Congress in paragraph 17 is irreconcilable with that contained in paragraph 6. Paragraph 6 commands that the so-called excess shall be paid to the Government. Paragraph 17 says that if the so-called excess earnings accrued by reason of excessive rates or discriminatory rates, the shipper shall be entitled to all of such excess, notwithstanding the fact that the Government has already received one-half of it. The only limitation in the declaration of paragraph 17 is that a shipper shall not be entitled to recover "upon the SOLE ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section."

It is somewhat difficult to determine exactly what Congress meant by the sentence above quoted. It seems to

contain two declarations: first, that no particular rate shall be deemed excessive so that a shipper may recover a proportion thereof upon the sole ground that the system of rates produced an excess; and, second, that whatever ground the shipper may recover reparation upon, it is not to come out of the so-called excess paid by the carrier to the Commission. In other words, the Congress undertook forever and conclusively to prohibit the railroad company from having any claim of any character upon the Government on the ground that it had paid excess earnings to the Government and then refunded, in the nature of reparation to the shipper, a part of the earnings which contained the assumed excess thus exacted, reported and paid.

The statute is not only in palpable violation of the Constitution, but it is so manifestly unfair and unjust that no court should feel obliged to enforce it until the constitutional bulwarks against the unlawful and arbitrary taking of private property shall be entirely and concededly demolished and obliterated.

IV.

The statute is unconstitutional as to appellant and therefore the orders entered in pursuance thereof the void as a violation of the Tenth Amendment to the Constitution of the United States because the recapture provision applies to the net income which is derived from the conduct of intrastate as well as interstate and foreign business and operates as a limitation upon the earning power of a Texas corporation with respect to its business done wholly within that State. The proper regulation of interstate and foreign commerce by Congress and its agencies has no such real or substantial

relation to high or excessive earnings on purely State business as will justify any limitation upon them by the Federal Government.

In this connection the petition reads in part as follows:

“(d) Complainant avers that a large and substantial proportion of the income earned or received by it and reflected in each and both of said reports as made to the Commission arose and accrued solely for and on account of rates, tolls, fares, and charges for the transportation of passengers and freight in intrastate commerce, conducted wholly within the State of Texas; that it is not within the power of Congress to take from complainant the earnings, or any part of the earnings, accruing to complainant from purely intrastate commerce; that to do so would be in violation of the Tenth Amendment of the Constitution of the United States, and any law seeking so to do would be wholly void; that the defendant herein and the Commission cannot complain, nor can they, or either of them, nor can interstate and foreign commerce and persons engaged therein, nor either or any of them, be in any manner injuriously affected or in the slightest way prejudiced by large earnings on the part of complainant accruing to it from intrastate commerce.

“That if the receipts and income of complainant from the handling and movement of intrastate traffic be unduly low, or amount to less than a fair return upon the value of the property devoted to that public service, manifestly the Congress and the Commission are prohibited by the Fifth and Tenth Amendments to the Constitution of the United States from further reducing those receipts by requiring a part thereof to be paid to the Commission and placed in the reserve fund contemplated by said Section 15-a. And, on the other hand, if the receipts and income of complainant resulting or accruing from the handling and movement of intrastate traffic are reasonably or sufficiently or even unduly

high, then, and in every such case, such receipts and income have and bear no such relationship to interstate or foreign commerce as will justify or create occasion for any interference with or regulation of or capture or recapture of the same, or any part thereof, by the Congress or the Commission under the power to regulate commerce with foreign nations and among the several States.

"That, as the State is forbidden to complain of earnings in interstate commerce, or to place burdens thereon, or to take the receipts and avails therefrom, so also the law is that the fact that a carrier is engaged in both state and interstate commerce does not authorize, permit, or justify the Congress or the Commission in complaining of or taking or reducing excess earnings arising from the conduct of intrastate commerce, nor authorize the imposition by Congress of unjust and unreasonable burdens upon intrastate commerce, nor authorize nor permit the Congress or the Commission or the United States to take from the complainant the earnings, or any part thereof, which accrued to complainant on account of earnings by it in purely intrastate commerce. Neither the law nor the Commission has made or attempted to make any rule, regulation, or provision by which excessive earnings, if any, in intrastate commerce may be separated or segregated from the earnings of the carrier in interstate and foreign commerce, and no such effort at separation has been made; and the Commission has demanded that complainant shall pay to it not only all the so-called excess earnings earned by complainant in interstate and foreign commerce, over which Congress has the power of control and regulation, but has also demanded that complainant shall pay to the Commission all of its so-called excess earnings, including those accruing to complainant for its services in purely intrastate commerce, the right to control which is expressly reserved, by the Tenth Amendment to the Constitution of the United States, to the State of Texas and to the people of the State, and

is not subject to the control, regulation, or dominion of the Congress of the United States nor of the Commission." (R. 13-14.)

The affidavit of J. J. Balderach (complainant's exhibit No. 4, R. 51-52) reads in part as follows:

"The gross freight revenue of said company, derived from interstate and foreign business during the period commencing March 1, 1920, and ending December 31, 1920, was \$119,597.83; that the intrastate freight revenues of said company for the same period were \$178,289.32, as shown by the statements attached hereto marked Exhibit 'A' and Exhibit 'B,' respectively.

"That the interstate and foreign freight revenues of said company for the calendar year 1921 were \$109,190.30, and the intrastate freight revenue of said company during the same year was \$238,861.50, as shown by the statements hereto attached, marked Exhibits 'C' and 'D,' respectively. That the passenger revenue of said company for said respective periods was as follows:

"Last Ten Months of 1920.....\$ 8,582.94

"Calendar Year 1921 10,213.64

"That all of said passenger revenue was derived from the conduct of purely intrastate business within the State of Texas, said company having had during the period involved in this suit no arrangement whatever for through travel or through tickets with any other line of railroad, and every passenger upon the trains of said company being required to pay local fare or purchase local tickets over its line. That, therefore, the freight and passenger revenue of said company for the last ten months of 1920 and the calendar year 1921, intrastate, as compared with interstate and foreign, was as follows:

	<i>Intrastate</i>	<i>Interstate</i>
Last Ten Months 1920.....	\$186,872.26	\$119,597.83
Year 1921	249,075.14	109,190.30
"Total.....	\$435,947.40	\$228,788.13

"From the foregoing it will appear that the receipts of the Dayton-Goose Creek Railway Company from the conduct of purely intrastate business, freight and passenger, was, for the last ten months of 1920, 60.97% of the total receipts from intrastate, interstate and foreign traffic, and was, for the year 1921, 69.52% of the same; and considering said two periods as a whole, the intrastate receipts amounted to 65.58% of the total receipts for the period commencing March 1, 1920, and ending December 31, 1921."

It is fundamental that Federal legislation, to be sustained under the commerce clause, must have an adequate connection with the proper conduct, or the protection, or the development, of interstate or foreign commerce. This rule has been many times announced by this court.

In *Adair v. United States*, 208 U. S. 161, 52 L. Ed. 436, 444, the court said:

"Manifestly any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated."

In *Mondou v. N. Y. N. H. & H.*, 223 U. S., 1, 56 L. Ed. 327, 345, the court reaffirmed that rule and, speaking of the Congressional power over interstate commerce, said:

"But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce."

In the *Shreveport Case*, *H. E. & W. T. v. United*

States, 234 U. S. 342, 58 L. Ed., 1341, 1348, substantially the same statement was made. And the court said that the authority of Congress

“extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.”

This is no novel doctrine in this court. The substance of it was expressed by Judge Harlan as far back as *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed., 205, in which the court, speaking through him, said:

“The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed are under a solemn duty to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution.”

There is in this respect no difference, of course, so far as the validity of an act is concerned, whether it be passed under the guise of an exercise of the police power or the commerce power. No one would have the te-

merity to say that a Federal act regulating the issuance of attachments in the State courts of Texas was valid simply because the Congress in enacting it *had recited* that such an act appeared to be necessary in order to promote the conduct of interstate commerce, and if it appears upon analysis that there is no reasonable connection between the proper conduct of interstate and foreign commerce and a relatively high system of State rates, it will follow that the earnings under those rates may not be limited by the Federal Congress nor reduced or recaptured.

Substantially the same statement was made in the *Wisconsin Rate Case*, 257 U. S. 563, 66 L. Ed. 371, 42 Sup. Ct. Rep., 232, in which the court said:

"Action of the Interstate Commerce Commission in this regard should be directed to *substantial disparity* which operates as a *real discrimination* against, and obstruction to interstate commerce, and must leave appropriate discretion to the State authorities to deal with the intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." (Italics ours.)

In *Nathan v. Louisiana*, 8 How. 73, 12 L. Ed., 992, the court said:

"Now the Federal Government can no more regulate the commerce of a State than a State can regulate the commerce of the Federal Government."

In *G. H. & S. A. v. Texas*, 210 U. S. 217, 52 L. Ed. 1031, 28 Sup. Ct. Rep., 638, the court struck down, as a burden upon interstate commerce, an act of the Texas Legislature levying a tax calculated upon the gross re-

ceipts of a carrier engaged in interstate and intrastate commerce. The doctrine of that case is equally applicable here. Congress has no more right to take a part of the intrastate receipts of a carrier than the State has to take a part of interstate receipts.

The *Shreveport Case*, *supra*, and the *Wisconsin Rate Case* did not involve at all the situation which we have here. In each of those cases the court had to deal with a system of State rates which was unduly low. It was pointed out, particularly in the *Shreveport Case*, that an unduly low system of State rates constituted a direct impediment to the proper conduct of interstate and foreign commerce in several ways. First, a system of State rates which did not afford a fair return for the service rendered under those rates would necessarily result either in the insolvency of the carriers, which were the instrumentalities of interstate commerce as well as of the internal commerce of the State, or in burdening interstate commerce with more than its fair share of the cost of transportation in order to prevent the bankruptcy of those carriers. Therefore, the general public shipping in interstate commerce were directly and injuriously affected, either by having to pay for their service more than it should rightfully cost or by having a poorer service than they should be given on account of the inadequate financial resources of the carriers engaged in both classes of business.

Second, an unduly low system of State rates constituted an unreasonable discrimination against persons and localities engaged in interstate commerce to the advantage of those competing with them by shipping wholly within a single State. It was pointed out for

example that a jobber in Dallas or Houston could ship his goods, intrastate, to points in Texas in the direction of Shreveport for a smaller charge per mile than the jobber at Shreveport could ship the same kind of goods under identical conditions in the direction of Dallas or Houston. Substantially the same kind of discrimination was found to exist in the *Wisconsin Case* by virtue of the interstate passenger fares having been fixed at 3.6 cents per mile while the intrastate fares remained at 2 cents per mile.

The Congress has undoubtedly the right to protect interstate commerce and those engaging in it, to foster, to develop it and to prevent the imposition of burdens upon it. In those cases where the general level of State rates is such as to interfere directly or indirectly with the conduct of interstate commerce, the court has plainly and rightfully said that:

“Congress as the dominant controller of interstate commerce may, therefore, restrain undue *limitation* of the earning power of the interstate commerce system in doing State work.” (*Wisconsin Rate Case*.)

But it may not be assumed in this case that the State rates are too low. Such an assumption would be suicidal for those who attempt to sustain the validity of this act, because they would straightway be met with the proposition that if the State rates are already too low any further reduction of them by recapture or any other process would plainly be confiscatory and in violation of the Fifth Amendment. In order to avoid that immediate source of destruction the assumption must

be, either that the State rates are amply high, or that they are at least, in some degree, excessive.

But, if the State rates are sufficiently high, or if they be excessive, the connection between the earnings under State rates and the proper conduct of interstate commerce, which exists in the case of a low system of State rates, immediately and entirely disappears. Instead of any tendency toward the bankruptcy of interstate carriers and their consequently diminished ability to perform their interstate functions, the tendency is, of course, toward affluence and an increased ability to serve that part of the public shipping and traveling in interstate commerce. Instead of giving the public shipping or traveling in interstate commerce the alternative of paying excessive rates or submitting to a deteriorated service, under a high system of state rates they may have a better service for an equal or a proportionately smaller charge. Instead of the jobber in Shreveport moving his groceries 100 miles for a fixed sum, as against the movement of the goods of his Houston competitor 125 miles for the same sum, the discrimination is either removed, if the State and interstate rates are on the same level, or, if the State rates are fixed too high, such discrimination as may remain prefers the interstate shipper instead of operating to his disadvantage.

Of what rightful concern is it to the Federal Congress that a Texas corporation earns a large return upon its investment by the conduct of a business wholly within the limits of that State? In what way can that return have injurious effect upon the efficiency of an interstate railroad system? What burden can thus be placed upon

that system or upon the shippers who resort to it for service in the conduct of their interstate affairs? Is it not plain that, to paraphrase the language of the Chief Justice in the *Wisconsin Rate Case*, the effect of the act is merely to place a limit upon the earning power of a railroad doing a purely intrastate work? If there is any power in this government by which such limitations may be imposed, it obviously rests in the people of the State of Texas or their legislature, and not in the Federal Congress or in its Commission.

It is said on behalf of the Commission that a contention similar to the one here made by appellant was made by counsel for the State Commissions in the *Wisconsin Rate Case*. That statement is not borne out by the opinion in that case. The decision of that case was pitched entirely upon the proposition that the State fares discriminated against and placed a burden upon interstate passengers and interstate commerce and that Congress had a right to remove this discrimination and to relieve interstate commerce of this burden. Here, the assumption must be, as has already been pointed out, that the State rates are ample or too high, and it follows that there is no possible discrimination against interstate commerce and no burden upon it.

It is also said that the effect of this act upon the receipts from intrastate commerce can be justified upon the theory that we have here a novel system or method of fixing rates. The theory is that rates may be fixed "prophetically" by an order which establishes them absolutely in advance in the hope that the aggregate net income produced by the entire system of rates so fixed will amount to a fair return upon the value of the prop-

erty employed in the public service. Or, the regulatory body "may permit rates which are relatively just and free from discrimination but which, so far as the carrier is concerned, are tentative and subject to the test of actual results." It is said that rates may be fixed which are relatively too high upon condition that, at stated intervals, the carrier will yield up to the government the excess above what is just and reasonable, that excess to be determined by the carrier's operating results or income account. There are several answers to this argument. It assumes, in the first place, that Section 15a of the Interstate Commerce Act fixes, in the manner described, the intrastate rates of carriers. That this assumption is erroneous there can be no question. In the *Wisconsin Rate Case* the court said:

*"Section 15a confers no power on the Commission to deal with intrastate rates. * * ** It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. *It does not involve general regulation of intrastate commerce.*" (Italics ours.)

Even if the court had not in that case given such a decisive negative to the assumption, it is submitted that, with one possible exception, the Congress in the system of rate regulation provided in the Interstate Commerce Act, as amended by the Transportation Act, has reached the extreme limit of its constitutional power in dealing with intrastate rates. It has undoubtedly been claimed at times that the Congress might, under the commerce clause, authorize the Commission to fix all rates, State and interstate, for railroads engaged in interstate com-

merce, just as it has made the Safety Appliance Act applicable to all vehicles moving over such a railroad irrespective of the character of commerce contained in any particular car. The Supreme Court, however, has not gone to that extent. In the case of *State of Texas v. Eastern Texas Railroad Company*, 258 U. S. 204, 66 L. Ed. 566, 572, 42 Sup. Ct. Rep., 281, the court pointedly refused to construe the abandonment provisions of the act to apply to the absolute and complete abandonment of a railroad lying wholly in Texas. The road, up to the time of the issuance of the Commission's certificate, had been engaged in interstate commerce. The court said:

"The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.

"If paragraphs 18, 19 and 20, be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, *a serious question of their constitutional validity will be unavoidable*. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said, 'where a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the

other of which such questions are avoided, our duty is to adopt the latter.' ”

“Although found in the Transportation Act, these paragraphs are amendments of the Interstate Commerce Act and are so styled. They contain some broad language, but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the one we have described. Only by putting a liberal interpretation on general terms can they be said to go so far. Being amendments of the Interstate Commerce Act they are to be read in connection with it and with other amendments of it. As a whole these acts show that *what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce.* * * *

“These considerations persuade us that the paragraphs in question should be interpreted and read as not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business.” (Italics ours.)

If the Congress should vest the Interstate Commerce Commission, through a power of suspension, similar to that which the Commission now exercises with respect to interstate rates, with the right to prevent, in advance, the same kinds of discrimination against interstate commerce which the Commission now has the power as evidenced by the *Shreveport* and *Wisconsin Cases*,

to remove after they become effective, it will be plain that no further interference with the State rates by the Congress or the Commission can be justified under the Constitution. That is the only gap now left in the fence. With respect to the prevention of such discriminations the Commission is now as helpless as a common law court without the equity power of issuing injunctions, but if this additional power should be given to the Commission there will not only be no further necessity for any interference with State rates by the Federal Government, but no justification for such interference can be found. So far as State rates are concerned the remedy will not only be plain and adequate for the protection and development of interstate commerce, but it will be speedy and efficacious in the highest degree.

Consequently, the recapture provisions of Section 15a can not be justified upon the theory that it initiates a conditional system of fixing rates, because that theory leads us directly back to the original objection that such power as Congress has over intrastate rates is purely incidental to its paramount power over interstate commerce and that Congress may not, as stated in the *Minnesota Rate Cases*, and quoted again with approval in the *Wisconsin Case*, "deal with the internal concerns of the State as such." (*Minnesota Rate Cases*, 230 U. S. 352, 57 L. Ed. 1511, 399.)

There are other objections to this theory of fixing rates conditionally which are dealt with elsewhere in this brief. For instance, assume two railroads paralleling each other between the same points and operating under substantially the same conditions. Both are hon-

estly, efficiently and economically managed but one manager is somewhat better than the other. Assume that one of these roads at the end of the year earns exactly six per cent upon the value of its property and that the other earns seven per cent. If this act is valid then the better operated road ultimately retains smaller rates than the other. Would not rates so fixed result in such a discrimination and lack of uniformity as to amount to a taking of property without due process of law in violation of the Fifth Amendment; "or, what is equivalent thereto, be so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." (*Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 36 Sup. Ct. Rep. Ct. Rep. 236, 244, 60 L. Ed. 493.)

The argument is also made that if a carrier can not complain of a system of rates under which it earns a fair return, for example, six per cent., it has no just complaint if the rates are fixed so as to produce more than that amount with a condition that the excess shall be repaid to the government, and it is said:

"If it could not have objected under the old law to rates yielding it \$10,000,000, it can not complain if the new law leaves it \$10,000,000, but reaches that result by permitting it tentatively to collect more and recapture part." (Bunn Recapture of Earnings Provisions of Transportation Act, Yale Law Journal, Vol. 32, No. 3, p. 223.)

It is true that if a general level of rates were fixed for all carriers which produced a fair return on the part of some, those carriers which earned a fair return would have no complaint; but the statement quoted

above overlooks entirely the proposition that while there may be no complaint of a direct taking of property there may yet be a perfectly valid complaint on account of a discrimination so gross as to produce the same result, as indicated by Chief Justice White in the case of *Brushaber v. Union Pacific Railroad Co.*, *supra*. There can be no distinction in principle between an act of the Federal Congress placing a direct limitation upon the earning power of a Texas corporation on business done wholly within that State and a Congressional Act which undertakes to limit the hours during which children may work in mills or factories.

The decisions of this court in *Green v. Louisville & I R. Co.*, 244 U. S. 499, 61 L. Ed. 1280, and in *Sioux City Bridge Co v. Dakota County*, 43 Sup. Ct. Rep. 190, 67 L. Ed. Adv. Ops. 220, present the rule properly applicable. Those were both cases in which complaint was made of a discrimination in taxation, not by reason of an over-valuation of the property of the complainants, but by reason of a systematic under-valuation of the property of others. In the more recent case, the Chief Justice, speaking for the court said:

"The exact question was considered at length by the Circuit Court of Appeals of the Sixth Circuit in the case of *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 364, 365, 31 C. C. A. 537, and the language of that court was approved and incorporated in the decision of this court in *Greene v. Louisville & Interurban R. Co.*, 224 U. S. 499, 516, 517, 518, 37 Sup. Ct. 673, 61 L. Ed. 1280. The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured tax payer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment

of the great mass of under-assessed property in the taxing district. This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle that *where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.*"

The questions, if not arising on the same facts, are identical in principle. Ordinarily, no man can complain if his property is assessed at full value, and ordinarily no public utility can complain if its rates afford at least a fair return upon the value of the property which it employs in the public service, but if one property owner, as has been held by this court, has a right to have his assessment at full value enjoined because the property of others is assessed at less than full value, it would seem to follow necessarily that a public utility is likewise discriminated against if its competitor is allowed special privileges and immunities, of which it is sought to be deprived, notwithstanding the fact that the complainant could not prove a case of confiscation. In other words, discrimination may exist in the absence of confiscation and the one is as thoroughly forbidden as the other; in fact, both are forbidden by the same amendment to the Constitution.

In *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101, the court passed upon the validity of such a child labor law, disguised as a regulation of interstate commerce, and struck it down, saying:

"The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production over, the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power." (Italics ours.)

Neither does *this* act "regulate transportation among the States," insofar as it seeks to condemn the earnings from intrastate commerce.

The argument of necessity and convenience which has been so urged in this case as a justification for the recapture provisions of Section 15a was so strongly urged upon the Congress that notwithstanding the decision in *Hammer v. Dagenhart*, it again undertook to regulate child labor within the States under the guise of an exercise of the taxing power, by imposing a special tax upon employers who violated the standards set by Congress. The validity of that act came before the court in *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 66 L. Ed. 817, 42 Sup. Ct. Rep. 449, 451. The opinion, delivered by Chief Justice Taft, is in part as follows:

"The case before us cannot be distinguished from that of *Hammer v. Dagenhart*, 247 U. S., 251, 62 L. Ed., 1101, 3 A. L. R., 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E. Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for

the same number of hours a day and days in a week as are penalized by the act in this case. This court held the law in that case to be void. It said:

“ ‘In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate t^e hours of labor of children in factories and mines within the States,—a purely State authority.’ ”

“In the case at the bar, Congress, *in the name of a tax* which, on the face of the act, is a penalty, seeks to do the same thing, and the effort must be equally futile.

“The analogy of the Dagenhart case is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax; and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a State, in order to coerce them into compliance with Congress’ regulation of State concerns, the court said *this was not in fact regulation of interstate commerce*, but rather that of State concerns, and was invalid. So here the so-called tax is a penalty to coerce the people of a State to act as Congress wishes them to act in respect of a matter completely the business of the State Government under the Federal Constitution. This case requires, as did the Dagenhart case, the application of the principle announced by Chief Justice Marshall in *M’Culloch v. Maryland*, 4 Wheat, 316, 423, 4 L. Ed. 579, 605, in a much quoted passage:

“ ‘Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this trib-

unal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.' " (Italics ours.)

Noble State Bank v. Haskell, 219 U. S. 104, 575, 55 L. Ed. 112, 341, 31 Sup. Ct. Rep. 186, 299, was presented in argument below and will doubtless be relied upon in this court to sustain the statute under consideration. In that case the court upheld the validity of the statute of Oklahoma establishing a fund for the security of deposits in State banks organized under the State law. That this decision can not successfully be relied upon to sustain the statute involved in the case at bar would seem to be obvious. The first opinion in that case is the more readily understood when taken in connection with the opinion written on motion for leave to file a petition for rehearing.

The banks to which that law applied were chartered by the State which enacted the law and those charters were expressly subject to alteration, amendment, or repeal. There can be no question but that the State of Oklahoma, as an original proposition, might with entire propriety have enacted a law for the incorporation of State banks under which banks so chartered would, as a condition of incorporation, and of the transaction of the banking business within the State, have been obliged to contribute to such a fund as was created by that statute. Having the right to authorize a charter upon those terms and having the express right to alter and amend charters already granted there can be no doubt about the power of the State on this ground to say, in substance, to the Noble State Bank: "Here are some new conditions which are appended to your char-

ter. You may have your election—you may either accept and operate under the charter as amended or you may dissolve and liquidate and go out of business.” The decision of the case in the Supreme Court might have been pitched solely upon this ground with entire propriety. That the force of this argument was not overlooked by that court is apparent from the opening paragraphs of the opinion. But the court instead of depending entirely upon this proposition decided the case also upon the ground that the exertion of power involved was an appropriate exercise of the police power.

The distinction between the Haskell case and this one is simple and clear. There is a marked difference between the rights of persons affected by an exercise of the power to regulate commerce and the rights of persons affected by an exercise of the police power of a State. The decision of the Haskell case was partly based upon the proposition that the law involved was a valid exercise of the police power. Under that power it has been repeatedly held that the use of property may be prohibited and its value practically or entirely destroyed without compensation. *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980; *Fertilizer Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204. On the other hand “in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use.” *Scranton v. Wheeler*, 179 U. S. 141, 45 L. Ed. 126. “The power

to regulate commerce is not given in any broader terms than that to establish postoffices and postroads, but if Congress wishes to take private property upon which to build a postoffice it must either agree upon the price with the owner, or, in condemnation, pay just compensation therefor." *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. Ed. 463. Insofar as the decision in the Haskell case was not grounded upon the police power, it was based on the fact that the law amounted to a proper amendment of the charter of the bank under a power of amendment expressly reserved at the time the charter was granted.

The situation here is different. This appellant was not chartered by the United States Government. It has no election to discontinue business. It may not cease the transaction of its interstate commerce business without the express consent of the Interstate Commerce Commission (*State of Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, 42 Sup. Ct. Rep., 281.) It may not cease to conduct the business of intrastate commerce without the express consent of the Legislature of Texas. It must stay in business and perform its functions as a common carrier and discharge its public duties and has no choice to accept the law or to reject it and go out of business as the bank had in the case referred to.

It is elementary, of course, that the Federal Government has no general police power. Such powers as it has are those which have been expressly granted and those which may be implied from them. It has no general mandate to conserve the general welfare. Such police regulations as have been enacted by the Congress and sustained by the courts have been enacted and sus-

tained as appropriate exertions of the powers, either expressly or impliedly granted by the Federal Constitution. For instance, in *Caminetti v. United States*, 242 U. S. 470, 37 Sup. Ct. Rep., 192, 61 L. Ed. 442, the court sustained the Mann Act upon the ground that it was a proper exercise of the power to regulate commerce. Therefore, if the law here in question can not be sustained as a regulation of interstate commerce, either because it constitutes an invasion of the reserved powers of the State or because it is violative of the Fifth Amendment or for any other reason it is futile to talk about the police power. The Oklahoma Bank Case is, therefore, not analogous and will ultimately give neither aid nor comfort to those who strive to sustain the validity of the law here attacked.

The net result of a consideration of that case is merely to bring us back to the original inquiry, whether the act in question is really an exertion of the power of Congress over interstate commerce; or whether, *under the guise* of an exercise of that power, it is not really a definite, a palpable and an unwarranted intrusion into the internal affairs of the State and therefore a plain violation of the Tenth Amendment.

If the appellant in this case earns a large return upon the traffic which it moves within the State of Texas, that income, no matter how large it may be, is no more within the province of Congress to limit or to regulate than was the subject of the hours of child labor in the cotton mills and furniture factories of North Carolina.

Keller v. United States, 213 U. S., 138, 53 L. Ed., 737, involved the validity of the Act of Congress of Febru-

ary 20, 1907, which prohibited the transportation of any alien woman or girl for the purpose of prostitution; penalized the importation of women and girls for that purpose and also penalized the keeping, maintaining or harboring of any such girl or woman for any such purpose within three years after entry. The defendant in that case, having been convicted of keeping and harboring, attacked the power of Congress to legislate with respect to a matter which was claimed to be solely subject to the police power of the State. Justice Brewer, speaking for the court and sustaining the attack upon the statute, said:

"While the acts of Congress are to be liberally construed in order to enable it to carry into effect the power conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced.

"We should never forget the declaration in *Texas v. White*, 7 Wallace, 700, 725, that 'the Constitution in all its provisions looks to an indestructible union composed of indestructible States.' "

In *G. H. & S. A. v. Texas*, *supra*, speaking of the duty of the court with reference to burdens laid upon interstate commerce by State Legislatures, the court said:

"Neither the State courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to regulation in a relatively immediate way, it will not be saved by name or form."

The duty of this Court with respect to an Act of Congress invading the powers reserved to the States and

their people by the Tenth Amendment to the Constitution is precisely the same as that which exists when it comes to consider an act by which a State invades a field committed to Congress. Therefore, this court may well say that neither the Congress nor the Commission, by giving this imposition a particular name or by the use of some form of words, can take away its duty to consider its nature and effect; that if it has no proper relation to, or connection with interstate commerce, if it could not burden or interfere with or impede the efficient and economical conduct of interstate commerce, and if it bears upon the internal commerce of the State so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form.

No matter what the purpose may have been, no matter how good may have been the intentions of the legislators, no matter how much they may have imagined they could constructively accomplish, when all is said and done they have enacted a law under which, for fear that some carrier might make more money than they would like to see it make, they have provided that a part of its earnings derived from purely intrastate commerce within the State of Texas should be paid over to the Federal Government, which, so far as the records show, had not contributed anything to the size of those earnings, and had no title to them and no conveyance from the parties who had originally paid the charges in which the assumed excess was supposed to exist.

V.

Section 15a of the Interstate Commerce Act does not levy or impose a tax and is not an exercise of the taxing power of Congress.

The court below, in its opinion, said:

"While the exaction in question is not denominated a tax, it is in effect an excise tax levied on all the carriers subject to the Transportation Act, payable from surplus earnings. In other words, the carriers are exempt from this tax who do not earn a certain per cent. on their invested capital, and all are exempt up to this percentage of net earnings. All whose earnings exceed that amount are required to pay the same percentage of the excess to provide a given fund. * * *

"The tax would be an excise tax on the business of the class of carriers named. * * *

"So regarded, the requirement that this fund be held in trust for, and be paid to the United States, is, as to the percentage of sums collected in excess of the percentage to be retained by the railway company, not the taking of its property without compensation or due process of law." (R. 67-68, 287 Fed. 732).

Laying aside for the moment the discussion of the proper construction of the Act, we note that this part of the opinion of the court below is subject to two vices:

(a) Even if the act be construed as levying a tax, as to that part of the carrier's income required to be paid to the Commission, that construction affords no escape from the proposition that the limitations and restrictions placed by the act upon the use or disposition of that portion of its so-called excess earnings which the carrier is permitted to retain, plainly result in a deprivation of property and liberty without due process. The court was apparently driven to the conclusion that the act could not be sustained except by adopting the tax theory and that the tax theory would dispose of the whole matter and of all objections urged

against the act. But the moneys to be placed in the reserve fund, which the carrier is required to establish and maintain, are certainly not the proceeds of a tax; they are not claimed by the government; they are conceded to be the property of the carrier. Yet, the government assumes to say to the carrier that it may not use that part of its property except for certain limited and specified purposes, and then only upon certain conditions which may or may not arise. This objection to the act will be more fully developed in another portion of this brief, but it has seemed proper to draw attention, at this point, to the fact that the tax theory can not save the act from the constitutional objections urged against it.

It can save if anything, only one-half of the question at issue, and that is the fifty per cent. of so-called excess earnings to be paid to the government. The remaining fifty per cent. stands out untouched and undisposed of by the tax theory, and wholly orphaned by the court cries aloud for the protection of the constitution and in condemnation of the tax theory of the lower court.

(b) The opinion then proceeds with the statement that:

"This part of the income of the road," namely, the part required to be paid to the Commission, "is not collected by it absolutely as its property," but "in trust for and to be paid to the United States."

This statement is utterly incompatible with the idea of a tax and is itself sufficient to refute the theory upon which the act was sustained by the court below. The essence of a tax is that it involves an involuntary *transfer*

of title from the subject to the government, in order that the property transferred (usually money) may be devoted to governmental purposes. A tax measure is one by which the government *acquires* something which it did not have before. If no additional funds or property be acquired no revenue is raised and no tax can be said to have been levied. While it may be entirely proper for Congress to provide in a revenue law for a transfer of government funds from one depositary or officer to another, nevertheless a law providing solely for a transfer of funds already belonging to the government is certainly not a tax law. The government does not tax itself, and no tax is levied unless the effect of the levy is to require the subject to deliver to the government something which had previously been the property not of the government but of the tax payer. If, therefore, this part of the carrier's income had never been earned by it as its own absolute property, and if, when earned, it was the property of the government, the requirement that it be paid to some other officer or department of the government can not constitute the levy of a tax. If it became the property of complainant it may not be taken except in accord with the provisions of the Fifth Amendment, and the act makes no provision for such accord.

We recur then to the question whether Section 15a of the Interstate Commerce Act, properly construed, can be held to levy an excise or other form of tax. In considering this question it must be borne in mind that this act was framed and passed in the early part of 1920. During the five years next preceding the passage of this act the Congress of the United States had had more

experience in framing revenue measures than ever before in any similar period of time, and, therefore, the presumption that Congress was acquainted with the technical expressions customarily used in the levy of taxes, has, in this instance, more than ordinary weight. No words, however, appropriate to the levy of a tax are found in the Section of the act under consideration. In framing the original excise tax imposed upon corporations (Act of August 5th, 1909, 36 Stat. 11, 112), Congress declared:

“That every corporation * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation. * * * ” (Sec. 38.)

In the preceding Section the tax on foreign built pleasure vessels was assessed by the use of the words:

“There shall be levied and collected annually * * * upon the use of every foreign built yacht, pleasure boat, or vessel * * * a sum equivalent to a tonnage tax.”

In Section 36 it was stated:

“That a tonnage duty * * * is hereby imposed.”

By Section 210 of the Revenue Act of 1918 it was declared:

“That * * * there shall be levied, collected and paid for each taxable year upon the net income of every individual a normal tax.” (40 Stat. 1062.)

Many other revenue laws could be cited to show that Congress has uniformly employed the proper technical

words appropriate for the levy of taxes when that was the purpose in view. For instance, such words as "levy," "assess," "impose," "duty," "tax" and the like have been used. The entire absence of any such words from this section of the Interstate Commerce Act can not fail to be significant.

It is also worthy of mention that the Transportation Act included many provisions which were not incorporated into the Interstate Commerce Act, as, for instance, those relating to the Labor Board, to settlements with carriers respecting the use of their property during Federal control, and those relating to the six months guaranty. The scope of the Interstate Commerce Act has always been confined to measures relating to the regulation of interstate carriers. If it had been the purpose of Congress to levy a tax for the purpose of creating the loan fund into which these so-called excess earnings are to be paid, it would have been more consistent, not only with the scope and purpose of the Interstate Commerce Act, but also with the methods employed in drafting the Transportation Act, if Congress had provided, in the Transportation Act alone, for a method of raising the revenue, and had put into the Interstate Commerce Act, by amendment, only so much of that matter as related to the investment or use of the fund by the Commission. The fact that the provisions for these payments by carriers were carried into the Interstate Commerce Act denotes that the object and purpose of Congress was not to raise revenue or to levy a tax but to accomplish some other end, under pretense of regulation.

The title of the Transportation Act, in which these

provisions are found, carries no suggestion that it contained any taxing measures.

While the title of an act of Congress is not conclusive as to the legislative purpose or design, it may at least be resorted to as an indication. *Millard v. Roberts*, 202 U. S. 429, 50 L. Ed. 429.

The controlling factor, however, in determining the intention of Congress is the language actually employed in the law to be construed. The language of paragraph (5) of Section 15a removes any doubt that may have existed on the subject. The statement there is that:

"Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, *without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return* upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States." (Italics ours.)

The recitals contained in paragraph (5) are in the nature of a preamble which this court has well denominated as "a key to open the understanding of a statute." *Coosaw Mining Company v. South Carolina*, 144 U. S. 550, 36 L. Ed., 537.

These recitals in the act make it obvious that the

purpose of Congress was not to raise revenue but that it was to limit the earnings of those carriers so favorably situated as to be able to earn a comparatively high rate of return from any level of rates which would support their average competitors. This court plainly recognized that purpose on the part of Congress when it said, in the *New England Divisions Case*, (*Akron Canton & Youngstown R'y Co. v. United States*, 43 Sup. Ct. Rep.):

"Moreover, it was not clear that the people would tolerate greatly increased rates, (although no higher than necessary to produce the required revenues of weak lines) *if thereby prosperous competitors earned an unreasonably large return* upon the value of their properties. The existence of the varying needs of the several lines and of their *widely varying earning power* was fully realized." (Italics ours.)

The fact that these moneys were to be paid to and administered by the Commission rather than the Treasury Department also negatives the thought that any tax was levied or assessed. The Treasury Department has always been the official tax collector of the government and no construction of an Act of Congress changing this established order should be lightly adopted. The income taxes payable by carriers are determined as to amount by the books of account kept by the carriers under the supervision of the Commission. The same books of account would determine the so-called excess earnings of the carriers. If it be said that the superior equipment of the Commission for investigating the accounts of carriers caused Congress to impose upon the Commission the duty of collecting these excess earnings,

why was the same duty not imposed upon it with respect to income taxes payable by carriers?

If the act is a taxing law it is necessarily an appropriation act as well, by virtue of which the proceeds of the tax are made available for the loan fund mentioned in Section 15a, just as in Section 210 of the Transportation Act (41 Stat. 468) the sum of \$300,000,000.00 was appropriated to carry out the purposes of Sections 206 and 210 of that act. If the act be looked on as an appropriation measure it violates another firmly established precedent of the government by appropriating funds to be received, not only beyond the end of one fiscal year, but those to be taken in for all time in the future.

Furthermore, considering the fact that Congress, as evidenced by the appropriation just referred to, had in mind the necessity for making appropriations of government funds to carry out the purposes of the Transportation Act, is it not extremely significant that the word "appropriation" is nowhere used with respect to the devotion by the Commission of the moneys supposed to be received by it under Section 15a to the purposes of the fund provided for in that section?

Furthermore, the appropriation made by Section 210 of the Transportation Act was treated as other public moneys and the effect of the law was to permit that sum of money to remain in the Federal Treasury, until loaned or expended, as provided in the act. The Commission, it is true, had some administrative duties with respect to loans to be made from that fund, but it was not given the control of the fund and the fund was left with the Treasury Department as all other public moneys resulting from taxation.

These conclusions, therefore, are inescapable:

That by this law Congress did not intend to levy or assess a tax of any character; that it did not in fact levy or assess a tax; that it did intend to limit the earnings of carriers by railroad available for distribution to stockholders; that it sought to impose this limitation by taking a part of the earnings of prosperous carriers; and that the creation of the loan fund was a mere incident of the desire to limit earnings and was a mere make-weight employed to give color to an unconstitutional taking of private property by providing what was thought to be an appropriate use for the moneys taken; the recital of the purpose was merely intended to sugar-coat the unconstitutional taking of property of the citizen.

In the opinion of the court below the New England Division case (*A. C. & Y. R'y Co. v. United States*, 43 Sup. Ct. Rep. 270), is relied upon as authority for the holding that the so-called recapture provision is an excise tax and quotation is made from the statement in that opinion as follows:

"In other words, the additional revenues needed were raised partly by a direct, partly by an indirect tax."

But this court in that expression had no reference whatever to a tax in the sense of a governmental levy to be paid by the citizen. This is made plain from all parts of the opinion, and particularly by what immediately follows, in which it is said:

"No part of the revenues needed by the New England lines is paid by the western carriers. *All is paid by the community pursuant to the single rate*

increase ordered in ex parte 74. If, by a single order, the Commission had raised joint rates throughout the eastern group forty per cent. and in the same order had declared that ninety per cent. of the whole increase and joint rates should go to the New England lines (in addition to what they would receive under existing divisions), clearly nothing would have been taken from the Trunk Line and Central Freight Association carriers in so ordering. The order entered in *ex parte 74* was at all times subject to change. The special needs of the New England lines were at all times before the Commission. That these needs were met by two orders, instead of one, is not of legal significance. The order here in question may properly be deemed a supplement to, or modification of, that entered in *ex parte 74.*" (Italics ours.)

While the opinion itself clearly does not justify the construction that the so-called excess earnings recapture provision is not considered as a tax, one additional consideration so completely differentiates what is said in the opinion quoted from the construction given it by the court below, that we direct the court's attention to it.

This difference is that *ex parte 74* was the act of the Interstate Commerce Commission, and not of Congress. *Ex Parte 74* was an act of the Commission to increase railroad rates, not to levy or assess a tax, in response to a congressional mandate, and this court, in the opinion quoted, declared that "the order here in question may properly be deemed a supplement to, or modification of, that entered in *ex parte 74.*" So that, if the opinion in the New England case is to be held as an authority for declaring the so-called recapture of excess earnings to be *an excise tax*, as held by the court below,

we have placed this court in the anomalous position of having held that the Interstate Commerce Commission might lawfully *levy an excise tax* upon the citizen. It is evident that the court below, in extracting from the opinion the single sentence quoted in its opinion, entirely overlooked the relation of the part to the whole, and took literally words of this court which were used only figuratively and for illustration.

VI.

The orders of the Interstate Commerce Commission dated January 16th and March 16th, 1922, expressly direct and require according to their terms, that within a fixed time one-half of all excess earnings, shown by the reports called for in such orders, shall be paid to the Commission, and inferentially direct and require that the other one-half of the excess earnings so shown be placed in the reserve fund contemplated by Section 15a of the Interstate Commerce Act.

Under the terms of Section 15a one-half of the excess earnings of carriers is "recoverable by" the Interstate Commerce Commission. This obviously means that the Commission is entitled to make demand for the payment of such sums, if any, as may become due under the law. The orders provide that "the amount should be paid by remittance to or draft in favor of the Interstate Commerce Commission." This expression follows the words "It is ordered." (R. 19-22.)

Argument is unnecessary we think to make it plain that this requirement of payment to the Commission is an essential part of the order. Counsel for the Commission construes this language as a statement by the

Commission to the effect that the carrier is admonished and reminded that under the law the money should be paid to the Commission. Counsel for the Commission evidently did not confer with the Director of the Commission's Bureau of Finance before taking this position. Under date of September 23, 1922, the Director of that Bureau wrote to the Treasurer of Complainant (R. 34) stating that "*under the terms of the orders one-half of this amount should be placed in a reserve fund and the remaining one-half remitted to Mr. Geo. B. McGinty, Secretary.*" A month later, under date of October 20, 1922, a second letter was written in which the statement was made that "*under the terms of the orders one-half of this amount should be placed in a reserve fund and the remaining one-half should be paid by remittance to or draft in favor of the Interstate Commerce Commission.*"

This construction of the orders by the Director of the Commission's Bureau of Finance is, of course, not binding upon this court, but it plainly evidences the fact that appellant's construction of these orders is entirely in accord with the Commission.

Without attempting to indulge in any lengthy exposition of the meaning of the language used, we submit that the fair tenor and effect of the orders, when they are read in their entirety, is contained in the expressions quoted above from the demands for the payment of the money made by the Commission's Bureau of Finance. If the Commission had intended to give an admonition or a warning that would not have been difficult to do. The orders of an administrative body, such as the Commission, are not to be construed as strictly or by the same technical rules as a decree of court.

VII.

Appellant is entitled to be protected by an injunction against the penalties and prosecutions which will be inflicted upon it and its officers if it continues its refusal to observe the directions of Section 15a and of said orders of the Commission respecting the payment of money to the Commission and into a reserve fund.

The relief by way of injunction to protect citizens against the enforcement of an unconstitutional law or administrative order is so common and has been so frequently granted that it is not necessary to cite the cases in which writs have been issued for this purpose. In the bill of complaint, admitted by the motion to dismiss, it was alleged:

"That complainant is informed and believes and charges that under the Act to Regulate Commerce, and amendments thereof and supplements thereto, and under the so-called Elkins Act and amendments thereof, defendants contend that complainant, and each of its officers and directors, is subject to a fine in a sum not exceeding five thousand dollars (\$5,000.00), for failure to comply with the demands of the Commission to pay to it and to pay into said reserve fund the said several sums of money hereinbefore set out. Complainant alleges that it is informed and believes and so avers, that the defendants contend that each of its officers and directors is subject to be prosecuted by the defendants herein, and particularly by the defendant Randolph Bryant, acting in his official capacity as United States District Attorney as aforesaid, unless said respective orders of the Commission are complied with and unless said respective sums of money, aggregating the sum of fifty-five thousand, four hundred and thirty-three and 22-100 dollars

(\$55,433.22) are paid to the Commission and into the so-called reserve fund, as required by said Section 15a, and demanded by said Commission; that the construction of said laws by the defendants is a constant and continuing menace to complainant, for the reason that its officers and directors, other than its president, have small interests in the properties of the complainant and cannot afford to take the risk of being prosecuted for violation of the laws of the country and being subjected to fines and humiliation on account thereof, nor can complainant afford to ask them to take such risk in order to continue in its service, and upon information and belief complainant avers that it is in constant, continuing and imminent danger of losing the service of its officers and directors, as they would probably resign if any such prosecution should be instituted or for their own protection they might compel complainant to pay said sums of money, which in the judgment of complainant it does not owe and should not be compelled to pay. If such officers and directors should resign, complainant could not procure others to take their places without giving them full and complete indemnity against financial liability, and as it cannot give indemnity to the present officers and directors, nor to any future officer or director, against the humiliation of being prosecuted for crime and against the annoyance and inconvenience of being haled into court to answer charges for violation of the laws of the country, complainant is confronted with the constant menace of the resignation of its officers and directors, the inability to obtain others, and the consequent inability to perform its functions and discharge its duties as a common carrier, for failure to do which it would be subject to very severe and extreme penalties under the laws of the State of Texas and under the laws of the United States.

“That prosecutions against said officers and against complainant would practically destroy complainant’s ability to conduct its business and dis-

charge its duties. If complainant should pay said sums of money so demanded by the Commission to the commission, and set aside said special fund as required in the orders of the Commission, in order to avoid prosecutions and to enable it to continue to conduct its business, no provision is made in the Interstate Commerce Act or in the amendments thereof or supplements thereto, or in any other law of the United States, through, under, or by which such money could ever be recovered, though wrongfully paid, as the United States has never consented by law to be sued in any court for the recovery of any such sum so paid; and if complainant be wrongfully advised in this respect, and if there be a method by which the courts could determine the liability in this respect and compel restoration to complainant of any money paid by it to the Commission upon unlawful demand therefor, yet nevertheless the expense incident to a suit for that purpose would be very large, as such suit would have to be conducted in the District of Columbia, which is some twelve hundred miles from the situs of complainant's property and its conduct of its business, and even if it should recover the sums of money so paid by it, it could not recover such expenses and could not recover the interest on said money which would remain in the hands of the Commission or in the hands of the government for many years, pending a determination of the issues here involved.

"Complainant further alleges that if the validity of said orders and demands of the Commission and of said provisions of Section 15a of the Interstate Commerce Act be not challenged and tested in a proceeding of this character, the Commission will sue complainant to require the enforcement of said orders and demands and for the recovery of said sums of money and for fines and penalties; that in any such suit there will necessarily be involved the issue of the value of complainant's property devoted to the service of transportation and to common car-

rier purposes; that the proper solution of that issue will depend upon many facts, will involve many complexities, and the cost of making preparation for and the trial upon that issue, necessitating the employment of clerks, auditors, engineers, and other laborers and specialists, will be extremely burdensome; all of which may be avoided by the present form of action.

"Complainant avers upon information and belief, that unless said several sums of money so demanded by said Commission are promptly paid, and said orders otherwise complied with, said Commission will undertake to prosecute Complainant, its officers and directors, for fines and penalties for failure to so pay, and that the defendant, Randolph Bryant, United States District Attorney, will be called upon by said Commission to institute prosecutions on account of the disobedience of said orders, and that he will in his capacity, as such United States District Attorney for the Eastern District of Texas, proceed to institute and vigorously push such prosecutions for the recovery of such fines and penalties.

"All of the matters and things above alleged and charged would cause to complainant irreparable injury, which could not be recovered in damages, nor could it otherwise be made whole, and consequently complainant is wholly without remedy at law for any relief against the wrongs, ills, trespasses and injuries herein complained of, and, unless restrained by your honor's most gracious writ of injunction, will be wholly remediless against the same.

"Complainant further avers that no damage or injury can or will result to the defendants if said prosecutions are enjoined and prohibited and the payment of said money is restrained, and complainant here now offers to enter into bond, with good and solvent sureties, in amount and form sufficient and satisfactory to the court, to guarantee the payment of all sums of money and the performance of every obligation on the part of complainant which

it may finally be adjudged to pay or to perform, and for all damages for such failure, and all interest on any sums of money which it may lawfully and ultimately be adjudged to pay.

"For as much as your complainant is wholly without any adequate remedy at law it avers that it will be wholly remediless unless protected by this Court's restraining order and writ of injunction." (R. 15-17.)

These averments of the bill were not specifically denied by the Commission's answer. On the contrary it rather emphasizes them, because the answer asserts that the orders of January and March, 1922, were by the Commission duly made and duly served upon the appellant in accordance with the authority conferred upon the Commission by law and that the law conferring such authority is constitutional and valid. (R. 39.) This is an affirmation of the proposition that the Commission regards its orders as lawful and enforceable and it may be assumed that until that view is changed it will endeavor to perform its duty by doing all things necessary and appropriate for their enforcement.

Paragraph (1) of Section 10 of the Interstate Commerce Act reads as follows:

"(1). That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited, or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any

act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense; PROVIDED, that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

The opening sentence of the Elkins Act, as amended June 29, 1906 (32 Statutes at Large, 847, 34 Statutes at Large, 584), is as follows:

"That anything done or omitted to be done by a corporation common carrier subject to the Act to Regulate Commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons, except as such penalties are herein changed."

By paragraph (1) of Section 12 of the Interstate Commerce Act "the Commission is hereby authorized and required to execute and enforce the provisions of this act."

Paragraph 6 of Section 15a of the Interstate Commerce Act definitely requires that one-half of all excess earnings shall be placed in the reserve fund there mentioned until said fund equals five per cent, of the carrier's property, and that the other one-half shall be paid to the Commission. It would, therefore, appear that if the act is valid and if the orders actually require the payment and the complainant fails to pay, then, in the language of Section 10, complainant will "willfully omit or fail to do an act, matter or thing in this act required to be done" and thereby under Section 10 and the amendment to the Elkins Act, the corporation, its officers and directors, would be subject to prosecution and to a fine of not to exceed \$5,000.00 for each offense.

The only reasonable assumption therefore which may be indulged in the premises is that, regarding its orders as valid, the Commission will, unless restrained, proceed to have penalty suits instituted against appellant and prosecutions against its officers for their failure to observe and comply with the orders here under attack. If the law is invalid, the orders are invalid and their enforcement should be enjoined as against the Commission and the District Attorney as well as against the Government. If the law is valid, then in any event the appellant should be allowed a reasonable time after the final termination of the litigation within which to comply with the law, and with the orders of the

Commission made in pursuance thereof, before any penalties are inflicted upon it.

VIII.

This record shows conclusively that the true value of appellant's property, held for and used in the service of transportation during the respective periods involved substantially exceeded the amount upon the basis of which appellant's so-called excess earnings, as disclosed in the record, have been computed. Therefore, a failure to accord relief herein would result in taking, as so-called excess earnings, portions of appellant's private property not justified or required by the terms of the act in question, without due process of law, in violation of the Fifth Amendment, even if the act be held valid for all purposes.

Appellant's so-called excess earnings, as shown by the returns which it made to the Commission (R. 24, 28), were computed upon the understanding that the rules of the Interstate Commerce Commission, assumed appellant's *investment* in road and equipment represented the *value* of its property upon which, under the act, it is entitled to earn and keep six per cent, and that the report of the so-called excess earnings was required to be made upon this assumed basis.

In the bill of complaint, the averments of which were admitted by the motion to dismiss, appellant stated:

"That said reports truly reflected the receipts, expenses, earnings, income, assets, properties, property costs and book values, according to the rules and requirements of the Commission, but neither of said values represents the true value of complainant's property, which is devoted to and used

for common carrier purposes, and complainant especially denies that either such value is the true value of its said property, and avers that in making its reports it used such values solely because it understood the rules of the Commission to compel complainant to use and set up such values from its books and records, and complainant duly reported to the Commission all the facts called for in each of said respective orders, in accordance with the rules prescribed in said orders, and in accordance with the books, records and accounts of complainant for the respective periods covered by said reports as of the dates of said respective reports and as kept in accordance with the accounting rules promulgated by said Commission. But said reports do not, and will not in the future, truly reflect the actual receipts, expenses and income properly and equitably attributable to said respective periods of time, as is more fully set forth below." (R. 5-6.)

In sub-division (b) of paragraph thirteen of the bill of complaint (R. 11) it was further alleged:

"Said reports do not reflect the true facts as to the property values devoted to carrier purposes."

The answer of the Commission (R. 36-38) disclaimed any information as to the truth or falsity of these allegations and, as between the Commission and the appellant, put the same in issue.

At the hearing appellant supported the foregoing allegations by the following proof:

(a) A valuation of its property by the Railroad Commission of Texas, acting within the scope of its lawful authority, showing that the property as of June 30, 1922, had a value of \$929,020.82 (R. 42-43).

(b) The affidavit of its vice-president and general manager, Mr. A. E. Kerr (R. 44-45), in which it was

stated that, in his opinion, the value of appellant's property held for and used in the service of transportation on the 30th day of June, 1922, was *not less* than the sum so found by the Railroad Commission of Texas; that the additions and betterments to the property between January 1, 1922, and June 30, 1922, less retirements, amounted to \$21,798.93; that the additions and betterments, less retirements, during the calendar year 1921 amounted to \$59,254.73, and during 1920 they amounted to \$102,596.72; that in his opinion the value of said property as of December 31, 1921, was not less than \$907,221.89; as of December 31, 1920, \$847,967.16, and as of December 31, 1919, \$745,370.44; and the fair average value of said property during the calendar year 1920 was not less than \$796,668.80, and during the year 1921 was not less than \$877,594.52. He further stated that the betterments for 1920 and 1921 were distributed throughout the year and the last two figures were obtained by adding one-half of the betterments made during the year to the total value as of the first of the year.

(c) Appellant also introduced the affidavit of its vice-president and treasurer, J. J. Balderach (R. 49-57), who executed the returns to the Commission on behalf of appellant (R. 25, 30). Mr. Balderach stated in this affidavit:

"As alleged in paragraph nine of said petition the reports of Dayton-Goose Creek Railway Company, copies of which are attached to said petition as Exhibit "C" and Exhibit "D," directly reflected the receipts, expenses, earnings, income, assets, properties, property costs and book value, according to the rules and requirements of the Interstate Commerce Commission, and that by said

reports said company duly reported to the Commission all the facts called for in each of said respective orders in accordance with the rules prescribed in said orders and in accordance with the books, records and accounts of said company for the respective periods covered by said reports as of the dates of said respective reports and as kept in accordance with the accounting rules of the Interstate Commerce Commission.

"That in my opinion the value of the property of said company devoted to the service of transportation, as shown upon said reports, respectively, does not represent the true value of such property as of the periods covered by said respective reports, which true value, in the opinion of affiant, is substantially in excess of any value shown in either of said reports. That both of said reports were compiled, checked and verified by affiant and that in making said reports affiant used the values shown therein because he understood the rules of the Commission contained in the orders referred to in said petition to compel said company to use and set up the value of said property from its books and accounts."

The investment in road and equipment, as shown in the returns made by appellant to the Commission, was on February 28, 1920, \$543,471.97; on December 31, 1920, \$613,994.82, and on December 31, 1921, \$699,502.96 (R. 24, 26, 31), making an average for the 1920 period of \$578,733.40 and for the year 1921 \$656,748.89. The average investment in road and equipment, therefore, as shown by the returns made to the Commission, is less by more than \$200,000.00 in each of the periods involved than the value fixed by the Railroad Commission of Texas and carried backward by Mr. Kerr's affidavit. In other words, the proof showed that the *true value* of appellant's property was so much greater than the cost

figures, used by mistake in the returns to represent those values, that if the figures given by Mr. Kerr had been used instead, the so-called excess earnings would have been, for each of the periods involved, less by at least \$12,000.00 than the amounts shown on the returns.

The bill therefore, as admitted by the motion to dismiss, and as proven on the hearing, makes out a plain case of mistake, involving in the aggregate about \$25,000.00, and even if the act and the orders of the Commission here under attack should be held to be valid, as against the constitutional objections urged against them, it is nevertheless plain that the court below erred in dismissing the bill and thereby denying relief against this mistake.

It is a matter of common knowledge that the Interstate Commerce Commission has undertaken to value the properties of the railroads of the country upon the prices prevailing as of June 30, 1914. The group valuations made in *ex parte* 74 may have had some influence in the preparation of the Commission's order requiring the reports to be made and stating what should be shown in those reports, to determine values of carriers having so-called excess earnings. But it is manifest from the record in this case, that no basis, consistent with the opinions of this court, was ever fixed by the Commission upon which to determine the value of appellant's property. It is necessary in this connection to note only one case.

In *State of Missouri ex rel Southwestern Bell Telephone Company v. Public Service Commission of Missouri*, 43 Sup. Ct. Rep. 544, the opinion of this court so obviously disposes of the case at issue that we are con-

tent with the pertinent quotation from that opinion, in which it was said:

"Obviously the Commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914 and 1916. As matter of common knowledge, these increases were large. Competent witnesses estimated them as 45 to 50 per centum.

"In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 41, 52, 29 Sup. Ct. 192, 195, 200 (53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034), this court said:

" 'There must be a fair return upon the reasonable value of the property at the time it is being used for the public. * * * And we concur with the court below that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase.'

"In the *Minnesota Rate Cases*, 230 U. S. 352, 454, 33 Sup. Ct. 729, 762 (57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann Cas. 1916A, 18), this was said:

" 'The making of a just return for the use of the property involves the recognition of its fair value, if it be more than its cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law.'

"*Eee*, also, *Denver v. Denver Union Water Co.*, 246 U. S. 178, 191, 38 Sup. Ct. 278, 62 L. Ed. 649, *Newton Consolidated Gas Co. of New York*, 258 U. S. 165, 42 Sup. Ct. 264, 66 L. Ed. 538 (March 6, 1922), and *Galveston Electric Co. v. City of Galveston*, 258 U. S. 388, 42 Sup. Ct. 351, 66 L. Ed. 678 (April 10, 1922).

"It is impossible to ascertain what will amount to

a fair return upon properties devoted to public service, without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values, made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded, such a forecast becomes impossible. Estimates for tomorrow cannot ignore prices of today."

(A) It is alleged in paragraph nine of the bill of complaint that the so-called value upon which the Commission computed its claim for excess earnings was not the true value of complainant's property, and this allegation being taken as true upon defendant's motion to dismiss the bill, it necessarily follows that the lower court erred in sustaining the motion.

It is a well settled rule of practice that "a motion to dismiss, like a demurrer, admits the truth of the allegations of fact in the bill." (*Foster, Federal Practice*, 6th Ed., Section 366.) The rule is thus stated in *Detroit United R'y v. City of Detroit*, 248 U. S. 429, 541:

"The question upon this appeal is: Did the bill, taking its allegations to be true, state grounds for relief to which the company was entitled upon the facts set forth? The action of the District Court (in dismissing the bill) was equivalent to sustaining a demurrer to the bill."

The same question is presented here. Did the bill of complaint, taking its allegations to be true, including the allegations in paragraph nine, state grounds for relief to which the company was entitled upon the facts set forth? The action of the lower court, in sustaining the motion to dismiss, must stand or fall upon the averments

of the bill, unaided by the allegations of the answer. (*U. S. v. R'y Employes' Dept.*, 286 Federal 288; *Krouse v. Brevard Tannin Co.*, 249 Federal 538; *Stromberg v. Holley*, 260 Federal 220.)

In paragraph nine it is averred that the reports made by the complainant to the Commission properly reflected the receipts, expenses, earnings, income, assets, properties, property costs and book values, according to the rules and requirements of the Commission, "but neither of said values represents the true value of complainant's property, which is devoted to and used for common carrier purposes, and complainant especially denies that either such value is the true value of its said property"; and complainant further averred that in making its reports to the Commission it used such values solely because it understood the rules of the Commission to compel it to use and set up such values upon its books and records.

The case in this court, therefore, is one where it stands admitted that the value of complainant's railroad property, upon which the six per cent. return is based, and on which the Commission has computed the alleged excess earnings demanded in its order, is not the true value of the property. How, then, can the Commission's order or assessment be permitted to stand?

Under the provisions of paragraph 6 of Section 15a of the Interstate Commerce Act, one-half of the net railway operating income "in excess of six per centum of the value of the railway property held for and used by it in the service of transportation" shall be paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund. It is appar-

ent, therefore, that net railway operating income up to six per cent. of the value of the railway property is exempt or immune from the recapture provision. This six per cent. must first be determined and set aside before it can be ascertained whether there are any excess earnings subject to recapture, and if so, the amount thereof. But it is six per cent. upon *the value* of the property. The value of the property, therefore, is the starting point. Until the value is determined, there can be no computation of the immune six per cent. Nor can it be said that there will, or will not, be excess earnings subject to recapture.

The bill alleges that the figure upon which the immune six per cent. was based "was not the value of the railway property," and this allegation, for the purpose of this appeal, is admitted to be true. The true value of complainant's railroad property must be something different from the figure used by the Commission. There has been, therefore, no computation of the immune six per cent. upon the true value of the property. Until the true value is made to appear it cannot be said how much, if any, the net railway operating income exceeded six per cent. of such value, and hence there is nothing to show that there are any earnings subject to recapture. The foundation on which the Commission's computation rests is proven to be false, and therefore the computation itself and the order of the Commission are made upon a wrong theory of law, without facts or evidence to support it, and the contested order is beyond the power and authority of the Commission, and therefore invalid.

It is true that the complainant reported to the Commission (R. 24-33) a statement of its investment in road and equipment, and the items making up its net railway

operating income, and that the Commission took the investment in road and equipment as the value of the complainant's property, and based its computation thereon. But the complainant expressly stated in its reports that they were not filed voluntarily, but by compulsion, and under protest and for the sole purpose of avoiding prosecution and possible penalties (R. 25, 28), and further protested against the accuracy of the preliminary bases prescribed in and by the order of the Commission, and all rights were expressly reserved to object to any conclusions which the Commission might reach upon the reports so filed, as well as to any report or order made thereon or in connection therewith. These reports, in legal effect, were made under duress, and hence they work no estoppel against the complainant (*Union Pacific R. Co. v. Public Service Commission*, 248 U. S. 67; *Pomeroy on Equity Jurisprudence* (6th Ed.), Section 948; *Swift v. U. S.*, 111 U. S. 22; *U. S. v. Holland-America Line*, 205 Federal 943.)

Furthermore, value is a judicial question (*Monongahela Case*, 148 U. S. 312; *U. S. v. New River Collieries Co.*, decided May 21, 1923). Thus far, no one knows with certainty how railroad property is to be valued in the application of the so-called recapture clause of the Transportation Act, or what rules or principles are to be applied. It still remains for this court to settle and determine these questions. Certainly, under these circumstances, the complainant cannot be estopped to show the true value of its property, as it now proposes to do in its bill, by reason of the compulsory reports made by it to the Commission, wherein it undertook merely to state facts, without any conclusions or speculations of its own as to the value of its property.

It clearly appearing, therefore, on the face of complainant's bill, that the value of complainant's railway property, upon which the Commission had made its computation, was not its true value, a clear ground for relief is stated, and the lower court erred in sustaining the motion to dismiss.

(B) The Commission erred in arbitrarily adopting cost of road and equipment as the true value of the complainant's property, and therefore its order based thereon is unlawful, and its enforcement should be enjoined.

It appears from Exhibit "D," attached to complainant's bill of complaint (R. 30), that six per cent. on investment in road and equipment for 1921 amounts to \$39,181. This sum is apparently adopted by the Commission as six per cent. upon the value of the complainant's railroad property. Such value would be represented, therefore, by capitalizing the sum of \$39,181 at six per cent., which gives the sum of \$653,033 as the amount of investment in road and equipment for that year, and this figure is *assumed* by the Commission to represent the value of the complainant's railroad property for the purpose of proceeding under the so-called recapture clause. In other words, the Commission takes the cost of road and equipment as shown on the complainant's books and solemnly declares that this is the value of complainant's railroad property on which it is entitled to earn six per cent., and no more, without paying one-half of the surplus to the Commission.

While the rules and principles for the determination of the value of railroad property in the application of the recapture provision have not yet been definitely and

authoritatively determined, yet it is fairly well established that *cost* is not *value*. It was, therefore, error on the part of the Commission to take the cost of road and equipment, particularly cost of original construction, not shown to be cost as of the date of the inquiry, and to treat it as the value to which the recapture provision should be applied.

That value is not measured by cost is apparently established in this court (*State of Missouri v. Public Service Commission*, decided May 12, 1923; *Bluefield Water Works & Improvement Co. v. Public Service Commission*, decided June 11, 1923; *Georgia Railway & Power Co. v. Railroad Commission*, decided June 11, 1923). In the *Southwestern Bell Telephone* case the court quotes with approval the following from the *Minnesota Rate* cases, 230 U. S. 352, 454:

"The making of a just return from the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

Doubtless original cost, and cost of production as of the date of the inquiry, are relevant pieces of evidence to be considered in the determination of value; but neither of these pieces of evidence, taken by itself, can arbitrarily be said to constitute or measure value. As said in the *Bluefield* case, *supra*:

"The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment

having its basis in a proper consideration of *all* relevant facts." *The Minnesota Rate Cases* (1913), 230 U. S. 352, 434.

In the *Georgia R'y & Power Co.* case, *supra*, it is recognized that reproduction cost is a proper piece of evidence to be considered, but that it is not the measure of value. The court said:

"The refusal of the Commission and of the lower court to hold that, for rate-making purposes, the physical properties of a utility must be valued at the replacement cost, less depreciation, was clearly correct."

The determination of value is a judicial function, and according to *Smyth v. Ames*, 169 U. S. 546, 647, various items of evidence, such as original cost of construction, the amount expended in permanent improvements, the amount and market value of stocks and bonds, the present as compared with original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all competent, relevant and material. None of these elements may be ignored. The final judgment determining the value must rest upon a consideration of all of them, giving each its proper weight.

But the Commission went through no such processes. It took the complainant's statement showing investment in road and equipment, as of some previous date, and arbitrarily said, "This is the value of complainant's property," and proceeded to apply the recapture provision to it. For this there is no warrant or authority in law.

Nor was there any evidence that the cost of road and equipment shown in the complainant's statement properly reflected such costs as of the date of the inquiry. The presumption would be otherwise, since the valuation made by the Railroad Commission of Texas as of June 30, 1922 (R. 42), indicates a total value of \$929,020.82.

The condition of the record, set forth in the immediately preceding pages of this brief, drives inevitably to the conclusion that whatever the ultimate holding may be, as to the constitutionality of the so-called recapture provisions of the Transportation Act, this case must be reversed, for that the value of the property of appellant devoted to a public use has never been ascertained in any lawful manner, and, as is conclusively shown in this record, greatly exceeds the amount upon which the Commission bases its right to collect the so-called excess earnings. If the so-called recapture provisions of the Transportation Act should be held valid it is nevertheless indispensable that this case be reversed by this court and returned to the lower court, for the purpose of determining the value of appellant's property devoted to a public use, and a consequent assessment of the so-called excess earnings, if any, when that value has been ascertained.

For the reasons set forth and upon the propositions contained in this brief, and upon the authorities, facts and argument, appellant prays that the judgment of the court below be set aside, that the so-called recapture clause of the Transportation Act be declared null and void, that judgment be here rendered for appellant, granting the relief it prayed for in the court below; and that, if the relief above prayed for be not granted,

the cause be reversed under proper instructions to the lower court, to ascertain and determine the value of appellant's property before any assessment or collection can be made for or on account of the so-called excess income provisions of the Transportation Act.

All of which is respectfully submitted,

FRANK ANDREWS,

ROBERT H. KELLEY,

Solicitors for Appellant.

ANDREWS, STREETMAN, LOGUE & MOBLEY,

Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 330.

DAYTON-GOOSE CREEK RAILWAY COMPANY, AP-
PELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Whether an adequate system of railway transportation throughout the continental United States shall be maintained and to that end whether the Transportation Act of 1920 is a valid exercise of Congressional power is the question.

Whether a particular clause of that act is constitutional when torn from its setting is decidedly *not* the question.

The act stands before the court with all of the presumptions of validity (*Nicol v. Ames*, 173 U. S. 509, 512). Moreover, the act has thrice been sus-

tained in practically all of its aspects in as many opinions of this court (*Railroad Commission of Wisconsin v. C., B. & Q. R. R. Co.*, 257 U. S. 563; *Pennsylvania Railroad v. Railroad Labor Board*, 261 U. S. 72; *New England Divisions Case*, 261 U. S. 184). Few cases in the last decade were of greater moment and it may be fairly assumed that this court gave to each the great care and due deliberation which their exceptional importance demanded. In undertaking now to overthrow and destroy that act the appellant and all of those who stand with it have not only assumed a heavy burden but a grave responsibility.

Dayton-Goose Creek Company alleges itself to be a common carrier by railroad subject to "the lawful provisions of the Transportation Act of 1920, * * * and all other lawful acts of Congress regulating railroads engaged in interstate and foreign commerce." (Tr. 2.) Congress, therefore, has the power to regulate it. (*St. Louis Southwestern v. United States*, 245 U. S. 136, 142; *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186.)

Exhibits A (Tr. 19) and B (Tr. 22) are orders of the Commission which appear to have been prepared for all of the carriers, and direct each carrier to report to the Commission, among other things, the amount by which the net railway operating income, as defined in paragraph 1 of section 15a, for the year ending December 31, 1921, was in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation; and where it

reports excess net railway operating income, the title of the fund account in which one-half of such excess was placed, the date when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held, and the amount of the remaining one-half of the excess income, as preliminarily computed, paid to the Commission and when and how such amount was paid.

In response to each order appellant made the report called for and accompanied it with what is called a protest (Tr. 24, 28)—the substance of which protest is that section 15a, which is also section 422 of the Transportation Act of 1920, is unconstitutional.

It is not denied that appellant holds \$27,716.61 (one-half of \$21,666.24, for 10 months ended Dec. 31, 1920, or \$10,833.12; and one-half of \$33,766.99 for year ended Dec. 31, 1921, or \$16,883.49) (Tr. 6, 34), which it must deliver over to the Commission if its case fails as it did in the District Court.

The prayer of the original petition is that "the said orders of the Commission, and each of them, so far as they relate to the payment of money to the Commission and into said reserve fund," shall be stayed and suspended, and that the defendants be enjoined from instituting or prosecuting any civil or criminal suit or suits against complainant or any of its officers or directors, or either of them jointly or severally, until complainant can present to the court application for injunction, etc. (Tr. 17.)

The original petition had two objects: First, to annul and enjoin orders of the Interstate Com-

merce Commission; second, to enjoin the Commission and the United States Attorney from compelling obedience to the act.

Circuit Judges Walker and King and District Judge Foster sustained the motion of the United States to dismiss with a full opinion and final decree. (287 Fed. Rep. 728.) There are 28 assignments of error but the single question is one of constitutional power and that only. The whole proceeding is in the nature of a demurrer to Section 422 of the Transportation Act of 1920.

II.

THE TRANSPORTATION ACT.

The Transportation Act is entitled, "An act" (a) "to provide for the termination of Federal control * * *"; (b) "to provide for the settlement of disputes between carriers and their employees;" (c) "to further amend" the act to regulate commerce of 1887, as amended (41 Stat. 456), approved February 28, 1920. It consists of five titles, viz, I.—Definitions; II.—Termination of Federal control; III.—Disputes between carriers and their employees and subordinate officials; IV.—Amendments to interstate commerce act; V.—Miscellaneous provisions.

The broad purposes of the act are repeatedly cited, thus: In order "to best promote the service in the interest of the public and the commerce of the people" (41 Stat. 476, 477); to "best meet the emergency and serve the public interest," * * * "properly to serve the public" (41 Stat. 477); "that

the public interest will be promoted" (41 Stat. 482); to consider "the transportation needs of the country" (41 Stat. 488); to meet the necessity of enlarging the facilities "in order to provide the people of the United States with adequate transportation" (41 Stat. 488); "in the interest of the commerce of the United States as a whole" (41 Stat. 489); to enable the carriers "properly to meet the transportation needs of the public" (41 Stat. 491).

Section 422 of the Transportation Act of 1920 is as follows (41 Stat. 488):

SECTION 422. The Interstate Commerce Act is further amended by inserting after section 15 a new section to be known as section 15a and to read as follows:¹

* * * * *

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a

¹(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term "carrier" means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

* * * * *

(8) Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway

whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, struc-

property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose.

(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

(10) The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositories of the United States subject to the rules promulgated from time to time by the Secretary of the Treasury relating to Government deposits.

(11) A carrier may at any time make application to the Commission for a loan from the general railroad contingent fund, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry.

(12) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan from the general railroad contingent fund is necessary

tures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service

to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the Commission may make a loan to the applicant from such railroad contingent fund, in such amount, for such length of time, and under such terms and conditions as it may deem proper. The Commission shall also prescribe the security to be furnished, which shall be adequate to secure the loan. All such loans shall bear interest at the rate of 6 per centum per annum, payable semiannually to the Commission. Such loans when repaid, and all interest paid thereon, shall be placed in the general railroad contingent fund.

(13) A carrier may at any time make application to the Commission for the lease to it of transportation equipment or facilities, purchased from the general railroad contingent fund, setting forth the kind and amount of such equipment or facilities and the term for which it is desired to be leased, the uses to which it is proposed to put such equipment or facilities, the present and prospective ability of the applicant to pay the rental charges thereon and to meet the requirements of its obligations under the lease, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of leasing such equipment or facilities to the applicant as the Commission may deem pertinent to the inquiry.

(14) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the leasing to the applicant of such equipment or facilities, in whole or in part, is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant is such as to furnish reasonable assurance of the applicant's ability to pay promptly the rental charges and meet its other obligations under such lease, the Commission may lease such equipment or facilities purchased by it from the general railroad contingent fund, to the applicant for such length of time, and under such terms and conditions as it may deem proper. The rental charges provided in every such lease shall be at least sufficient to pay a return of 6 per centum per annum, plus allowance for depreciation determined as provided in paragraph (5) of section 20 of this Act, upon the value of the equipment or facilities leased thereunder. All rental charges and other payments re-

of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such deter-

ceived by the Commission in connection with such equipment and facilities, including amounts received under any sale thereof, shall be placed in the general railroad contingent fund.

(15) The Commission may from time to time purchase, contract for the construction, repair and replacement of, and sell, equipment and facilities, and enter into and carry out contracts and other obligations in connection therewith, to the extent that moneys included in the general railroad contingent fund are available therefor, and in so far as necessary to enable it to secure and supply equipment and facilities to carriers whose applications therefor are approved under the provisions of this section, and to maintain and dispose of such equipment and facilities.

(16) The Commission may from time to time prescribe such rules and regulations as it deems necessary to carry out the provisions of this section respecting the making of loans and the lease of equipment and facilities.

(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

(18) Any carrier, or any corporation organized to construct and operate a railroad, proposing to undertake the construction and operation of a new line of railroad may apply to the Commission for permission to retain for a period not to exceed ten years all or any part of its earnings derived from such new construction in excess of the amount heretofore in this section provided, for such disposition as it may lawfully make of the same, and the Commission may, in its discretion, grant such permission, conditioned, however, upon the completion of the work of construction within a period to be designated by the Commission in its order granting such permission.

mination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to $5\frac{1}{2}$ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally

ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of

establishing and maintaining a general railroad contingent fund as hereinafter described. For the purpose of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

(7) For the purpose of paying dividends or interest on its stocks, bonds, or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

III.

THE HISTORY OF THE TIMES UNDER WHICH CONGRESS
ACTED.

In *Stafford v. Wallace*, 258 U. S. 495, this Court, speaking by Mr. Chief Justice Taft, said (p. 513):

It was for Congress to decide from its general information and from such special evidence as was brought before it the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted. (*Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *Danciger v. Cooley*, 248 U. S. 319, 322.)

As a means of ascertaining the "history of the times" or "the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted," the reports and debates may properly be resorted to. (*United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 316, 320; *Standard Oil Co. v. United States*, 221 U. S. 1, 50. See also *Church of Holy Trinity v. United States*, 143 U. S. 457, 463; *Chicago Board of Trade v. United States*, 246 U. S. 231, 238.)

The court will take judicial notice that at the end of December, 1917, the Hindenburg Line was established. The Nation had been in the war nearly a year and its armies were moving to Europe in increasing numbers. The conflict had developed into

a war of transportation as well as a war of arms and the decisive battles were fast approaching.

Transportation facilities on both land and sea were inadequate while their need was paramount. For many reasons not necessary here to set forth, but principally for lack of revenue to provide new equipment and to increase wages, the rail carriers had become unequal to a great national emergency. Congestion prevailed at all terminals. The report was prevalent that a man could walk from New York to Buffalo, or from New York to Philadelphia, or from New York or Philadelphia to Pittsburgh on the tops of loaded freight cars. At Chicago, Minneapolis, St. Louis, and Cincinnati conditions were the same. Rail carriers were confiscating such fuel as appeared on their tracks for use in their locomotives. Many of the great industries were threatened with shutdown for lack of fuel. The progress of shipbuilding was imperiled. Prolonged strikes on the part of the railroad and coal mine employees with the awful consequences were threatened and imminent. Public schools and churches were closed. Whole communities were without fuel and the winter of 1917-18 was the severest in a generation.

Circumstances such as these prevailed when the President issued the proclamation, on December 26, 1917, to take possession and assume control, for the national security and defense, of the entire railway transportation system.

March 21, 1918, the Federal control act was approved, which became the charter of the President in the control and operation of the carriers. On that very day the Germans opened their vast offensive at the Cambrai Line. Three days later the Germans reached the Somme. A short time thereafter they were again at the very gates of Paris. We were in the war for better or worse, and if the Allies lost, who would pay the bill but the United States. The crisis which then confronted the Nation is still fresh in the minds of all.

General Order No. 27, May 25, 1918, increased the wages of 2,000,000 railroad employees to an amount which approximated \$1,000,000,000.

General Order No. 28, May 25, 1918, directed an increase of 25 per cent in all freight rates, both interstate and intrastate, or an amount substantially equal to that of the increase of wages.

The Government found the railroads in a deplorable condition. They had been subjected not merely to double but quadruple regulation by governmental and nongovernmental powers. The Government of the United States since 1887 had tried to regulate them by affirmative legislation. The States continued to regulate them so far as this court in enforcing the Constitution permitted them to do so. The great railroad labor organizations, whose power was for the time being almost omnipotent in the matter of wages, regulated the largest part of their expenditures by compelling them to increase wages, until these wages had been increased far more than

the entire amount of the net revenues of the railroads in the year before the war. The great banking institutions, which were the sources of credit, regulated the railroads by prescribing the conditions upon which they could obtain money to build extensions or operate the railroads.

The fact is that the railroads had been regulated almost to their destruction. The goose that laid the golden egg was well-nigh moribund. The railroads no longer controlled either their income, for rates were fixed by both States and Nation, or their outgo, which was determined very largely by the rates of interest which bankers imposed and by the wages which labor organizations demanded.

The whole system, as an efficient transportation system, had broken down. If transportation is the backbone of the Nation that backbone was broken. Many railroads were in the hands of receivers and many more were headed toward the same graveyard. Everywhere was shortage of cars, equipment, and material.

Shortly before the war, Mr. James J. Hill, the sagacious railroad manager, had estimated that the railroads to be put into first-class condition required \$5,000,000,000, and yet with these enormous requirements the sources of credit were dried up.

The Government took over the railroads in this shattered condition and proceeded to expend, as a measure of the war, nearly \$1,500,000,000 upon them. At one time, the director general ordered 100,000 cars and 2,000 locomotives. Railroads were

consolidated, terminals were shared in common, equipment standardized, and finally, at infinite cost, the American railroads became almost as important an auxiliary in the world's greatest war as the British fleet itself.

The war had ended, and it was obvious that if the railroads were now returned to their owners without adequate protection many of them would immediately be thrown into bankruptcy and the shrinkage of values on \$20,000,000,000 of securities held by private investors would be so immediate and widespread that a panic of colossal proportions would sweep the country. The railroads could not possibly repay to the United States the vast sums which they owed the United States for betterments and withheld revenues, and, on the other hand, the railroads had made vast unliquidated claims against the Government for damages to their roads during the period of governmental operation.

The Transportation Act was passed to meet this difficulty and to avert this crisis. It was passed when the railroads were still under governmental control. If ever there was an emergency this was one, for if the problem could not be solved then there would have been a financial crash which would have done incalculable injury to intrastate as well as interstate commerce, and reduced the whole fabric of national prosperity to "careless ruin."

The Committee on Interstate Commerce of the Senate, on November 10, 1919, Senator Cummins (Iowa) Chairman, presented Report No. 304, to

accompany Senate Bill No. 3288, known as the railroad control bill. The report is printed herewith as Appendix A. (Cong. Rec. Vol. 58, Pt. 8, p. 8187.)

Senator Cummins (Iowa), Chairman Committee on Interstate Commerce, on February 19, 1920, presented the report of the Committee on Conference upon House Bill 10453, known as the Railroad Bill, and gave notice that immediately after the House acted upon and reported it, if it was adopted by the House, he would ask consideration on the part of the Senate.

On February 21, 1920, the final vote was taken by the House of Representatives on the Conference Report,¹ resulting in—Yeas, 250; nays, 150; not voting, 27. (Cong. Rec. Vol. 59, Pt. 4, p. 3316.)

On February 23, 1920, the final vote was taken by the Senate on the Conference Report, resulting in—Yeas, 47; nays, 17; not voting, 32. (Cong. Rec. Vol. 59, Pt. 4, p. 3349.)

Senator Cummins (Iowa), February 23, 1920, speaking to the Conference Report, said (Cong. Rec. Vol. 59, Pt. 4, p. 3327, 3328):

Fourth. That part of the Senate bill known as "section 6" was accepted by the House conferees with two principal modifications. The entire section was rewritten and now appears in the conference report as section 15a of the act to regulate commerce, while its phraseology has been somewhat changed it is essentially the same, with two exceptions, namely, the period in which the 5½ per cent basis is to continue as a direction to the Inter-

¹ Debates and proceedings in the House, see Appendix B, p. 122.

state Commerce Commission has been reduced from five to two years, and the division of excess earnings or income instead of being one-half between 6 and 7 per cent of the value of the property and one-quarter above 7 per cent is now one-half to the company and one-half to the Government throughout.

Inasmuch as this section has been the subject of the grossest misrepresentation on the part of some critics and the most mysterious misunderstanding on the part of many sincere people I deem it my duty to submit a brief comment upon it. In order to prejudice it among the people it has been termed "a guaranty of income." This is not true in any sense of that phrase. There is a guaranty in the bill of the standard return and against deficits, continuing for six months after the railways are returned to their owners, but this was in substance in both bills and apparently has not excited any considerable criticism, for in view of the circumstances its necessity is obvious.

Section 6, now 15a, is, however, not a guaranty, nor does it approach a guaranty even remotely. Not a dollar is to be paid from the Treasury on account of its provisions, and no obligation whatever on the part of the Government is created. It is a direction to an administrative tribunal that in so far as it may be practicable the commission shall make rates that will yield a net operating income of $5\frac{1}{2}$ per cent upon the true value of the railway property held for and used in the service of transportation considered as a

whole. The assumption of this basis by the commission does not promise to any given railway company any given net operating income, for the income depends wholly upon the location of the railway, the population it serves, the volume of its traffic, and the conditions under which it is operated. Under this basis some railways will earn 2 per cent upon the value of their property, some 4 per cent, some 6 per cent, some 8 per cent, a few more than 8 per cent, and a few less than 2 per cent. This basis takes no account of either stocks or bonds but is concerned solely with the value of the property as a whole. It is a basis about \$50,000,000 less in the aggregate than the basis of 1917 and about \$50,000,000 more than the basis of the test period as defined in the Federal control act. To call it a guaranty is to be either maliciously false or stupidly ignorant. Its value is found in its tendency to give stability to railway credit in the unsettled period through which we are passing. It is a legislative declaration of a rule by which we may assume the commission will be guided in the difficult duties which are to be immediately imposed upon it.

It gives the investing world the assurance that the commission will, during these two years, make an honest effort to adjust rates upon this basis. There are enough uncertainties attending the administration of the law without adding to them an uncertain basis of rate making. For the sole purpose of showing how absurd it is to speak of the rule as a guaranty, I may be permitted to suggest that

in applying it the commission must conjecture or estimate the volume of traffic which the railroads will carry in a future year, and, furthermore, it must conjecture or estimate the cost of maintaining and operating the railways during a time in the future.

If this provision accomplishes its purpose it will not be accomplished because it gives to railway companies undue profit but because it establishes a measure of confidence in the minds of those who have money to invest, which is now, unfortunately, lacking. I take it for granted that the chief desire of the American people is that their commerce may be supplied with adequate facilities for transportation. The country has suffered more in the last year on account of the inability of producers to reach their markets freely and promptly than from any other one cause, and while they want transportation at the lowest practicable cost their overwhelming demand is for transportation itself.

Without entering into the details of the situation, it is well known to every observer that we need from 100,000 to 200,000 additional cars; we need more main tracks, more sidetracks, more warehouses, and more terminal facilities of all kinds. If the railways are to succeed in giving to the people what they must have, if we are to prosper, these companies must borrow or secure in some way not less than \$600,000,000 this year and \$1,000,000,000 next year. In preparing the section about which I have been speaking I was not thinking so much about the return upon capital

already invested in the railway enterprise as about men who have money to loan or to invest and the conditions upon which they would be likely to make loans or investments in railway properties. It is my deliberate judgment that those Members of Congress who fail to take into consideration this problem in all its aspects and who use their influence either to delay or defeat this bill will in the end deeply disappoint the great body of the people intent upon marketing their products and in developing to the highest point our social and industrial systems.

One word with reference to the much-maligned requirement that a railway company receiving in any year a net operating income of more than 6 per cent upon the value of its property used in the service of transportation shall pay to the Government one-half of the excess.

This regulation is founded upon one of the long-established principles in the regulation of public utilities. It has been in common use from the very beginning of public control. It is neither socialistic nor confiscatory in its character. Some lawyers, looking at the question from the standpoint of their clients, may doubt its constitutionality, but the great majority of the legal profession find no difficulty in defending its validity. If we are to look upon transportation as a national subject and accept it as our duty to sustain railway carriers in all communities which are rendering an indispensable service, we must impose some such limitation. I predict that

this feature of the Senate bill, preserved in the conference report, will meet with almost universal approval and that the immediate future will vindicate its justice and efficiency.

Representative Esch (Wisconsin), February 21, 1920, speaking to the Conference Report of the two Houses, said (Cong. Rec., vol. 59, pt. 4, pp. 3267-3268):

I have here a statement showing the various expenditures itemized and concentrated, drawn from more elaborate statements made to us by Mr. Sherley. These figures may be of interest, and I read them:

The Government's total expenditures for additions and betterments up to March 1, when Federal control is to end under the proclamation of the President, amount in even numbers to \$1,152,000,000. The amount paid out for new equipment—that is, for the 100,000 freight cars and the 1,900 locomotives ordered during the period of Federal control and which were allocated to the several carriers—is \$372,000,000. Of this sum \$15,000,000 has already been paid in cash by some of these carriers, leaving, therefore, a balance for equipment of \$357,000,000 which the Government has expended.

The amount paid for additions and betterments to roadways and equipment for the whole period of Federal control amounted to \$70,000,000; but against this sum, under the terms of the bill, offsets are allowed by placing against the indebtedness of the carrier to the Government the Government's indebted-

ness to the carrier resulting from compensation under the Federal control act. There can be offset under the bill against the \$780,000,000 for additions and betterments the sum of \$461,000,000, leaving, however, as the sum to be funded \$319,000,000. This latter sum is to be funded for a period of 10 years, with the option of the carrier to pay any time within the 10 years.

The net excess of operating expenses and compensation to the carriers over the operating revenues for all the roads up to March 1 is \$854,000,000. There is due the corporations as compensation for interest and open accounts \$1,442,000,000, against which can be applied interest due on Government notes and open accounts and additions and betterments and indebtedness of \$709,000,000, making the net sum that must be paid the roads under the terms of the bill \$733,000,000.

After set-offs there will be owing the Government on account of additions and betterments \$319,000,000; allocated equipment—cars, locomotives, and so forth—\$357,000,000; and other indebtedness which will be represented in long-time notes or one-year notes, \$239,000,000, a total of \$915,000,000. The total amount which the Government must appropriate to make up what may be considered a shortage is \$646,000,000. If the \$200,000,000 herein appropriated is made, it would still leave \$436,000,000 to be appropriated.

The Director General will appear before the Committee on Appropriations early in April, setting forth the facts and circumstances and

asking for that appropriation. In short, gentlemen, the Government, as a result of our experience under Federal control, will have appropriated approximately \$1,900,000,000. Of that sum \$1,250,000,000 represents what has already been appropriated, and the additional \$200,000,000 herein provided will make \$1,450,000,000.

Representative Esch (Wisconsin), February 21, 1920, speaking to the Conference Report, said (Cong. Rec. vol. 59, pt. 4, pp. 3269, 3270):

But, gentlemen, my time is short. I shall take up what is known as section 6. You will find it in section 422 of the pending bill. It provides for a rate of return on the valuation of the railroad property either taken as a whole or within a given district or territory. This provision was not in the House bill. Against it the House conferees stood for five or six weeks and until the compromise was finally reached. The whole basis for section 6 can be found in these works in the bill, on page 91, paragraph 5:

“(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in ex-

cess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return shall hold such part of the excess, as hereinafter prescribed, as trustee for and shall pay it to the United States."

The large problem that has given difficulty to the Interstate Commerce Commission and to every regulatory body heretofore has been the fixing of rates on competitive traffic which will not allow one road to earn excessive income while another road on the same rate does not get a sufficient income. No formula has under existing law yet been discovered to meet that situation. You can meet it in two ways—by consolidation of all carriers under one system, where there would not be the problem of the weak and the strong, or under the plan suggested in section 422. The valuation of all railroad property used in the service of transportation in a given district or territory or in the country as a whole is to be made by the commission. The commission then prescribes such level of rates as will produce, as near as may be, a 5½ per cent return on such valuation. In this House I have strongly contended that we should adhere to the existing standard for rate making—that is, that rates should be just and reasonable—but longer consideration has driven me to the opinion that capital will not invest in railroad securities on merely a declaration that the commission shall fix just and reasonable rates.

25

Investors want something definite and fixed upon which they can reckon. The provisions of section 422 give that stability, that standard which, I trust, will encourage investment; but it is objected that we are making a standard based on the rate of return on the value of the property. What is the value of the property? For the present I acknowledge we have not yet available the physical valuation as prescribed by the act of 1913, but much information is already available to the commission secured under this act. Under section 422 the commission, in determining the aggregate value, shall give to the property investment account only such consideration as is allowed under the law of the land. We do not make capitalization—please mark this—we do not make capitalization the basis of valuation. It may amount to something, or it may amount to nothing. It is only one of the elements which the commission prior to the completion of the valuation work shall consider as laid down by the Supreme Court of the United States in the leading case of Smythe against Ames, One hundred and sixty-ninth United States Reports, opinion by Harlan, justice. What the valuation made by the commission will be I can not state. It will not be property investment account or the book cost, now estimated to be about \$19,000,000,000, for everybody knows that book cost or property investment account exceeds the capitalization. Prior to 1907, when the uniform system of accounting was prescribed, these property investment accounts were no doubt padded, but since that time every dollar invested in railroad prop-

erty is accounted for and can be found in the records of the Interstate Commerce Commission. It may be said, therefore, that neither the property investment account nor the capitalization will be the permanent standard of valuation. But the standard will be such as the commission will fix in the light of the information it already has and will secure as the result of the physical valuation act of 1913.

It is stated in the press and elsewhere that the railroads of the country are not worth more than, say, \$12,000,000,000, based on the tentative valuation of three or four small roads, such as the Kansas City & Southwestern, the Texas Midland, and a Georgia road—as these valuations amount to only 50 per cent of the book cost or property investment account, all the railroads of the United States are worth practically only 50 or 60 per cent of their book cost or property investment account. When the valuation of the great trunk lines, the lines that do 90 per cent of the country's business, is completed I am confident we shall find that their valuation in many cases will equal and, in some, exceed the capitalization. The Burlington & Quincy has a low capitalization; the Pennsylvania has a low capitalization. The Pennsylvania in the last 20 years has invested \$400,000,000, taken from its earnings without adding this vast sum to its capitalization. It spent this sum for betterments and improvements, thereby increasing the facilities of transportation and adding to the comfort and convenience of the people.

The valuation having been made, it does not mean that the Government guarantees to every carrier a $5\frac{1}{2}$ per cent return upon its valuation. I know that there are some papers and some individuals who believe that section 422 constitutes a guaranty and that every road is to get a $5\frac{1}{2}$ per cent return on the valuation of its property.

Nothing of the kind. There is no guaranty here in the respect that the Government must make good the difference between $5\frac{1}{2}$ per cent and what the road actually does earn out of its business. There is no such guaranty. The Government does not make good a dollar. On the contrary, the Government takes one-half the excess over the fixed return and puts it into a Government fund for use in transportation. Under this section some roads may earn 2 per cent, some 3, some 4, and some 5 per cent. It will depend upon each road as to whether or not it will earn $5\frac{1}{2}$ per cent. It is up to the roads, through efficiency, economy, and wise management, to increase their earnings, and if they get up to $5\frac{1}{2}$ per cent or 6 per cent, in the discretion of the commission, one-half per cent being allowed for additions and betterments, not included in capital account, they keep every dollar of it. When they get beyond that there must be a division. The division is a 50-50 proposition, beyond the point where this minimum return stops.

I know there are men in this House, as there are elsewhere, who have great doubts as to the constitutionality of the power of Congress to take this surplus and devote it to other uses

than to the uses of the agency which develops the surplus. There are eminent counsel on both sides of this proposition. Ex-Justice Hughes, Mr. Thom, and Judge Lovett claim that this is an unconstitutional exercise of power. We have as eminent counsel on the other side who say they have no doubt but that it is a constitutional exercise of power. Elihu Root, John S. Miller, and John R. Milburn are of that opinion.²

I am persuaded after further study, although in no way claiming to be an authority, that we have this power. Its constitutionality is further indorsed by the three men who in my opinion can speak with largest authority on the subject. These three men are Commissioner Clark of the Interstate Commerce Commission, the senior man in service on that commission, a man of great ability and large experience under the interstate commerce act. In his opinion Congress has this power; that is no more a violation of the Constitution than it is for Congress to take excess-profits taxes and put them into the Treasury of the United States and then loan them out through the farm loan act. He contends that this plan is the only way in which we can meet the problem of so fixing the rates between competitive points that they will not produce an excessive return to one carrier and less than a reasonable return to another. He stands for this proposition and for a division of the excess.

² Vol. 3, Hearings before Committee Interstate and Foreign Commerce, 66 Cong., 1st sess., pp. 2981-2986. Same, 3002-3009.

Who else supports this proposition? Judge Prouty, for many years the chairman of the Interstate Commerce Commission, one of the ablest chairmen that that commission has ever had, he, too, is in accord with this plan. And, lastly, Director General Hines supports this plan. These three men do not have any qualms as to the constitutionality of an act of Congress giving one-half the excess to the Government.

What is the Government going to do with its half? Does it take money from one railroad and give it to another, as is so generally contended? It does not. The excess that goes to the Government goes to the Interstate Commerce Commission and constitutes a fund out of which the commission can loan money to the needy carrier at 6 per cent interest, or out of which it can purchase equipment for leasing the same to the carriers at a rental which will represent 6 per cent on the value of the equipment plus a depreciation charge.

The Government is losing nothing. This is not a guaranty. The Government will secure a large sum of money in peace times when things again become normal. I do not expect the Government to get much of a fund in the very near future, but in time this plan will develop a considerable fund to be used for the purposes I have enumerated. So the Government is not losing anything. The Government is gaining something, and commerce and transportation will be vastly stimulated by reason of it. We do not destroy the initiative of the carriers. I know that argument is

made many times. Why, they get a half over the 6 per cent or the 5½ per cent, and that is a stimulus for the roads to use more efficiency more initiative, more wise management, because the more the road earns above the minimum the larger the company's share will be.

We require that these excess earnings on the part of the carrier shall be utilized to develop a reserve fund that shall in time grow to be 5 per cent of the valuation of the road; and after this reserve fund has been accumulated the carrier can use the money as it deems best.

Representative Fess (Ohio), February 21, 1920, speaking to the conference report, said (Cong. Rec. Vol. 59, Pt. 9, p. 8817):

Immediately the railway bill was taken up and the hearings opened on July 15. They continued every day, forenoon and afternoon, until September 24. An additional day was given October 4. These hearings were published in three large volumes of 3,669 pages. They constitute the finest body of the most important expert information on a great subject ever collected by any committee in the history of the Congress of the United States. The finest talent in America presented their facts and conclusions on the proposed legislation. This body of information represents every angle of transportation. No interest that made application to the committee was denied a hearing. Individual proposals were presented to the committee as bases of legislation. Weeks were consumed on hearing

these arguments. These proposals touched many single and specific features of the problem, any one of which, if considered as a single proposal, would occupy the attention of Congress for weeks in final consideration. There were between 30 and 40 such individual proposals offered to the committee. All of these were given such consideration as their importance demanded. Besides these there were seven matured plans presented and urged by as many associations or interests, in which groups of interests were presented. Among these were the Plumb plan, speaking for labor; the Warfield plan, speaking for security holders; the executives' plan, speaking for the owners; the Interstate Commerce Commission plan, speaking for the Government; and others. Those plans, each one of them, from specific angles presented strong arguments for adoption. In the nature of the case neither could be adopted, and considered individually they were more or less antagonistic to one another. It was the committee's problem to draft such a measure as to include the strong points of each and omit the questionable items of each, recognizing the importance of all the interests involved, but never losing sight of the larger factor—the public. The committee proceeded on the principle that if the public was served no justifiable interest could be greatly injured.

The Committee began the drafting of the measure with these points in view and reported it for committee consideration November 8. It passed the House nine days later,

on November 17, after one of the most able debates ever heard on any measure. The Senate passed the Cummins bill a month later, December 19. The two measures went to conference three days later. They were considered in conference every day, including Sundays and throughout the holiday season, without vacation until February 19. Considering the sharp differences between the two Houses the time was not too long. Among the many items of difference between the bills were those of credit and labor. These two were the most difficult because so vastly important. After weeks of effort to reach an agreement the conferees have reported a plan of agreement on both items which should be satisfactory to both interests, since it serves the public, which includes both the employer and employee. It duly respects the importance of credit and provides for it. It also duly respects labor and seeks to protect it.

Representative Steele (Pennsylvania), February 21, 1920, speaking to the Conference Report, said (Cong. Rec. Vol. 59, Pt. 9, p. 8818):

In section 422 of the bill a new section, to be known as section 15-A to the interstate commerce act, sets forth the necessity for the new basis of rate making, as follows:

"(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such

traffic, and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property, held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return shall hold such part of the excess as hereinafter prescribed as trustee for and shall pay it to the United States."

The payment to the United States, however, is in trust for the transportation purposes above mentioned.

The power of Congress to direct such use of excess earnings thus produced is challenged on the ground that if the rates charged by the carrier are just and reasonable they are the private property of the carrier, and if unreasonable it would deprive shippers and passengers of their property without due process of law. Is it, then, within the power of Congress to divide the railways into rate-making districts and establish rates on a group basis, directing that any excess earnings beyond a reasonable return be used to sustain transportation in the group as a whole and impress such excess earnings with a trust as set forth in the section above quoted? The question whether a law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized but upon its practical operation and effect. Congress being empowered to regulate commerce

among the several States and to pass all laws necessary and proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for the same.

Within the scope of the word "regulation," as used in the commerce clause, is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof. Generally speaking, what the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. It is manifestly a question for Congress to determine whether or not the regulations adopted are the best to promote the public interest. All that the courts have to consider in passing upon its constitutionality is as to whether it is calculated in any appreciable degree to advance the constitutional end involved. It is a settled principle of constitutional law that the Government which has a right to do an act and has imposed upon it the duty of performing that act must, according to the dictates of reason, be allowed to select the means, and those who contend that it may not select any appropriate means, that any particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception. In the present instance this burden has been met by the mere characterization of the rate-making basis selected by Congress as a

violation of the right of private property without the citation of any specific judicial authority to sustain the charge.

The control of interstate commerce having been granted to the Federal Government without limitation, the grant is, according to the general principle governing the interpretation of grants of Federal power, construed to be plenary. Such control is not confined to the instrumentalities of commerce or the Postal Service known or in use when the Constitution was adopted, but keeps pace with the progress of the country and adapts itself to the new developments of time and circumstance as the new agencies are successively brought into use to meet the demands of increasing population and wealth. And with reference to the fifth amendment, which forbids the taking of private property for public use without just compensation or due process of law, the Supreme Court has said:

"That provision has always been understood as referring only to direct appropriation and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses, may indeed render valuable property almost valueless. They may destroy the work of contracts."

It may be added that if this principle be not sound the result would be that individuals and corporations could by contracts between

themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted.

In the section quoted, Congress declares that in order to maintain lines of transportation for the convenience of the public it is necessary to establish rates that will produce a fair return on the aggregate value of the railroad property in the rate-making district. The public surely has an interest in the maintenance of these transportation facilities. It is a deliberate enactment declared to be necessary to meet conditions which actually exist. There is no express prohibition upon the right of regulation by Congress to establish rates with reference to aggregate or average conditions. Congress declares it to be impracticable to estimate the cost or value of each railway service. If the practicable method adopted by Congress produces an excess as to particular lines but necessary to maintain all the lines in a rate group, is that beyond its constitutional powers? Clearly this excess is still devoted to a public purpose and within the power of Congress. It does not interfere with past earnings but simply regulates future earnings and impresses these earnings with a public trust. As supervisory trustee of the public rights, under its express power of regulation, the Government asserts its power so as to give to all the people of a rate-making district the assured maintenance of their transportation lines. It is established

by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use, and also that the share of each party in the benefit of a scheme of mutual protection is a sufficient compensation for the correlative burden he is compelled to assume.

These principles have been applied to private property whenever in any way affected with a public interest, and apply with greater force to railroad corporations because they are engaged in a public employment. The provisions of the bill I have discussed are, in my judgment, a reasonable exercise of the power of regulation vested in Congress to promote the interests of interstate commerce.

On February 28, 1920, at midnight, the carriers were relinquished from Federal control and the Transportation Act became effective. Immediately the Interstate Commerce Commission commenced hearings on applications by the carriers under and in pursuance of the Transportation Act for increases in freight and passenger rates. In *Ex parte 74, Increased Rates*, 1920, 58 I. C. C. 220, on July 29, 1920, the Commission authorized general freight rate increases: Eastern Group, 40 per cent; Southern Group, 25 per cent; Western Group, 35 per cent; Mountain-Pacific Group, 25 per cent; all passenger fares, rates on excess baggage, and rates on milk and cream, 20 per cent; and a surcharge of 50 per cent of the charge for space in sleeping and parlor cars.

In *Wisconsin Commission v. C., B. & Q. R. R.*, 257 U. S. 563, 585, 589, this Court said:

The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in §15a to be one of the purposes of the bill. * * * Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory rate for all the work it does.

IV.

THE BRIEFS OF OPPOSING COUNSEL.

Counsel for appellant have filed an elaborate brief directed to the situation of the Dayton-Goose Creek Railway, a standard guage short line, operating between Dayton, Liberty County, Texas, to Goose Creek and Baytown, Harris County, Texas, a distance of about 25 miles. It has a trackage right over the line of the Trinity Valley & Northern from Dayton to a point northeast thereto at a connection with the line of Beaumont, Sour Lake & Western. It exchanges traffic with the Southern Pacific System and the Gulf Coast Lines. (Tr. 3.)

The brief argues that the "recapture clause" violates the Fifth and Tenth Amendments; that it does not assess or levy a tax, and that the record does not show a valuation upon which the quantum of the

so-called excess earnings may be recaptured. (Br. 24.) The learned counsel have adopted the expressions "recapture clause" and "excess earnings" and used them throughout the brief.

As *amici curiæ*, nineteen counsel representing as many trunk lines have filed a joint brief. With respect to section 422, they say (Br. 7):

Paragraphs (2), (3), and (4) of Section 15a undoubtedly constitute a regulation of commerce. We do not question that their object—the promotion of the commerce of the whole country through the rehabilitation of the credit of the carriers and the necessary enlargement of transportation facilities—was within the granted power to regulate interstate commerce. We do not question that these provisions were appropriate and legitimate means to accomplish that object, subject to the qualification that the percentage constituting a fair return could not be conclusively fixed by Congress or the Commission. (*Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins*, 176 U. S. 167, 173; *Lincoln Gas Co. v. Lincoln*, 250 U. S. 256, 267; *Bluefield Water Works and Improvement Co. v. Public Service Commission*, decided by this court June 11, 1923.)

Our challenge is directed to the subsequent provisions of section 15a, those embodied in paragraphs (5) and (6) *et seq.* of that section.

Thus, these nineteen trunk lines and their counsel readily embrace those paragraphs which are accepted as favorable to them. In almost the same sentence they reject correlative and interlocked paragraphs which place a limitation on what they so readily and

gladly accepted. Their argument is that any law which provides the money which the public must pay to maintain an adequate transportation system, is a valid regulation of interstate commerce; but that any limit fixed beyond which Congress will not go is unconstitutional even though the return amounts to 100 per cent. *Amici curiae* should not be allowed to stand for the validity of and claim the benefits under an act constructed as the Transportation Act and in the same breath "assert the unconstitutionality of its limitations." (*Grand Rapids & Indiana Railway v. Osborn*, 193 U. S. 17; *Daniels v. Tearney*, 102 U. S. 415; *Baltimore & Ohio v. Lambert Run Coal Co.*, 267 Fed. Rep. 776.)

The appearance of the nineteen trunk lines representing approximately 69,000 miles of railroad,³ or

³ Poor's Manual of Railroads, 1923, reports the mileage operated by each carrier listed in the brief filed by the counsel for the Trunk Lines, thus:	
	Miles.
Southern Pacific.....	14, 101. 74
Lehigh Valley.....	3, 511. 28
Western Pacific (and D. & R. G.).....	3, 647. 41
New York Central.....	17, 195. 10
Union Pacific.....	9, 449. 96
Chesapeake & Ohio.....	2, 555. 70
Western Maryland.....	804. 44
Illinois Central.....	4, 784. 64
Delaware, Lackawanna & Western.....	953. 84
Virginian Railway.....	540. 53
Duluth, Missabe & Northern.....	335. 90
Chicago & Eastern Illinois.....	945. 13
Kansas City Southern.....	843. 10
El Paso & Southwestern.....	1, 139. 90
St. Louis Southwestern.....	1, 775. 98
Wabash Railway.....	2, 472. 96
Pere Marquette.....	2, 212. 96
New York, Chicago & St. Louis.....	523. 22
New Orleans, Texas & Mexico.....	1, 015. 19
Total.....	68, 808. 98

one-fourth of the total, no longer makes the case one between the Dayton-Goose Creek Railway and the Government; it is now a case in which practically the entire system of railway transportation has representation.

The numerous counsel for the nineteen trunk lines reject the designations "recapture clause" and "excess earnings." They characterize paragraphs (5) and (6) as the "income-appropriation" provisions (Br. 8), and repeat the words in at least 77 instances, sometimes as frequently as five times on a single page.

Pause, or be more temperate.

It ill beseems this presence, to cry aim
To these ill-tuned repetitions.

The learned district court more accurately gauged the Congressional intent and its language is appropriate, viz (287 Fed. Rep. 732, 733, 734):

Indeed, this part of the income of the road is not collected by it absolutely as its property. It is earned and collected under the terms of the Transportation Act to be held in trust for, and to be paid to, the United States.

* * * * *

It is to be presumed that the rates permitted to be charged by the railroads under this Act are not unjust and unreasonable as to the shippers, where authorized by the Commission which is vested with such extensive powers as to seeing that such rates are just and reasonable and nondiscriminatory as to the shippers.

It may be also questioned whether the carrier could be charged, in any event, with

the percentage which had been paid therefrom to the United States under the terms of this Act.

But if the sums paid to the Government are to be regarded as overcharges paid by shippers and as money to which they are entitled, this does not give to the carrier any right to retain this sum, or to an injunction to restrain the Government from collecting the sum which the carrier is only allowed to collect as a trustee for the United States, or for special purposes prescribed by statute.

The Transportation Act provides that this fifty per cent of the excess over 6 per cent is not collected, or held, by the carrier for its own account, but as trustee for the United States, to whom it is to be paid.

Clearly, the carrier is not entitled to retain it in the absence of any demand on it for its repayment by the persons from whom collected.

* * * * *

It is not perceived what right the complainant has, in this situation, to decline to recognize its liability to the United States and make payment to the Interstate Commerce Commission, as its designated agent.

Thus, the repetitions of opposing counsel of the words "income-appropriation" are made in the face of the explanatory statements of members of the committees and the very carefully prepared opinion of the District Court, all to the effect that the excess is never collected by the carrier as its absolute property but under the statute it is a mere trustee of the same.

As *amicus curiae*, counsel for the Kansas City Southern Railway, who also appears on the brief of the nineteen, has filed a separate brief, in which he plunges into the Valuation Act, and contends that for the purpose of the recapture clause, that act requires the ascertainment of economic value, and that the economic value of railroad property bears a relation to the income which it affords. (Br. 3.) The brief is wide of the mark and deals with another section of the statute entirely (section 19a) which is not in controversy in this proceeding. The omission of such argument from the brief of the nineteen (in which the Kansas City Southern is included) would indicate that the other eighteen were also of opinion that the Valuation Act was not in controversy.

As *amici curiae*, three counsel for Wabash Railway, Western Maryland Railway, and St. Louis Southwestern Railway (two of whom also appear on the brief of the nineteen) have also filed a separate brief, and argue that the "income-appropriation" provisions are unconstitutional on their face because Congress legislated upon the assumption that a rate of six per cent upon the aggregate value of the carrier's railway property constitutes a fair return and that any income in excess of six per cent lies outside of the protection of the Fifth Amendment (Br. 3), thus (Br. 4):

It is our contention that six per cent is not a fair return upon railway property in any part of the country, but if we are wrong as to

this, and it is believed that six per cent is a fair return upon railway property in some parts of the country, then we submit that Section 15a is unconstitutional and void because it attempts to fix six per cent as a proper rate of return on railway property in every part of the country. (*Italics ours.*)

The principal authority cited in support of the proposition is *Bluefield Water Works & Improvement Company v. Public Service Commission*, decided June 11, 1923. In that case, according to the language of the brief, the Supreme Court did not overrule the principles laid down in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 48-50 (1909), in which it was held that *under the circumstances of that case* 6 per cent was a fair return on the value of the property employed in supplying gas to the City of New York and that a rate yielding that return was not confiscatory; or the principles laid down in *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655, 670 (1912), which declined to reverse the State Court where the value of the plant considerably exceeded its cost and the *estimated* return was over 6 per cent; or the principles laid down in *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 172 (1915), which declined to reverse the United States District Court in refusing an injunction upon the conclusion reached that a return of 6 per cent per annum upon the value would not be confiscatory.

This Court held in the *Bluefield Water Works Case* that "*under the facts and circumstances indicated by*

the record, we think that a rate of return of 6 per cent upon the value of the property is substantially too low to constitute just compensation for the use of the property employed to render the service." The Public Service Commission had failed to give proper weight to the "higher cost of construction" and to the "cost of reproduction less depreciation." This Court said: "The valuation can not be sustained." There is certainly no evidence in the record in the instant case (which involves the railway transportation system of the continental United States) which would indicate that there is any similarity between it and the facts and circumstances on which this Court reversed the decree in the *Bluefield Water Works Case*. On the contrary, the two cases are obviously so widely different as to dispense with comparison. Moreover, with respect to the six per cent return counsel for the nineteen trunk lines say (Br. 7), "Paragraphs (2), (3), and (4) of section 15a undoubtedly constitute a regulation of commerce."

In *Yale Law Journal*, January, 1923, in a very carefully prepared article entitled "Recapture of Earnings Provision of the Transportation Act." Mr. Charles W. Bunn,⁴ whose high standing and long experience at the Bar are as well known as that of any

⁴ Mr. Charles W. Bunn, St. Paul, Minnesota, has been General Counsel of the Northern Pacific Railroad Company for more than 26 years. He was counsel for the railroad companies in *Northern Securities Case*, 193 U. S. 197, 273; *Minnesota Rate Cases*, 230 U. S. 352, 364; *Ex parte Young*, 209 U. S. 123, 139. His article is referred to not only as an argument in favor of the validity of the recapture clause but as the opinion of an official who shares the responsibility of maintaining in accordance with the law of the land an adequate transportation system for the United States.

lawyer, soundly argues that the recapture clause is in all respects a valid exercise of Congressional power. He says (Y. L. J., Jan., 1923, p. 222):

On this principle legislation has been common which classifies or distinguishes between railroads and fixes a less charge for those on which traffic is dense or most profitable. Such classification was held reasonable in *Chicago, Burlington & Quincy Ry. v. Iowa*, 94 U. S. 155. And in *Chicago & Grand Trunk Ry. v. Wellman*, 143 U. S. 339, the court sustained a Michigan statute which fixed passenger fares differently on different roads according to gross earnings per mile.

If a carrier's rates may be made with reference to its prosperity lower than those of other carriers, and if no carrier can insist as an absolute legal right on receiving more than a fair return on the value of its property, it would seem that there can be no violation of the Constitution in the mere recapture of so-called earnings made after the act was on the statute books, provided that after the recapture the carrier is left with a reasonable return on the value of its property. The rates fixed as provided in the act are tentative only; and if any carrier's earnings are afterwards recaptured and its property and revenue left exactly where they would have been had rates been fixed originally to yield the same amount, it can make no difference to the carrier whether this result is reached by rates directly fixed for it or by higher rates fixed tentatively for a group, subject to readjustment through recapture.

Under the law as it stood before the act, if rates were fixed applicable to six competing roads which would give to road A, the most favorably situated of the six, a reasonable return on the value of its property and yield the other five roads less, it was settled that road A could not successfully object to the rates. Its constitutional right was held confined to an objection to such rates only as deprived it of a reasonable return on the fair value of its property. This precise question was determined in the *Minnesota Rate Cases*, 230 U. S. 352.

As *amicus curiae* counsel for the National Association of Owners of Railroad Securities has filed a brief in support of the validity of the Act. There appears to be division of opinion not only among the companies themselves but between the owners of the securities and the companies as well.

Counsel for the owners of the railroad securities in brief and the counsel for certain trunk lines companies in published articles in leading journals all stand on the side of the Government. Counsel who appear against the Government are numerous and so divided, even though they represent like interests, that they file separate briefs. Lack of unanimity on the part of those so gravely affected goes far to sustain the law. The diversity of their arguments bewrayeth them.

THE DECISIONS OF THIS COURT SUSTAINING THE BROAD
PROVISIONS OF THE TRANSPORTATION ACT.

In enacting the Transportation Act the Congress was avowedly considering the transportation system throughout the continental United States as a whole. To hold that the Congress enacted the broad provisions to raise revenue, to prescribe divisions, to provide for settlement of disputes between carriers and their employees, and for other equally important purposes, in order to maintain an adequate transportation system, and then to annul and strike down the standard or basis for which these enormous increased revenues are to be raised and equitably distributed or placed, would defeat the whole intention of the Congress and bring about a situation more destructive to the public interest than if no part of the Act had ever been passed.

Never in its history has Congress enacted a statute in which the sections were so closely interlocked and dependent each upon the other. The Congress was considering "the transportation needs of the country." If paragraphs (5) and (6) of section 422 are torn from the body of the Act, the whole foundation of the entire legislative scheme fails.

In cases thus far decided both the District Courts and this Court, in approaching the subject, have persistently exercised the judicial power with a scope coextensive with the congressional enactment, and have kept the entire Act and all of the carriers

subject thereto in full view at all times, to the end that all of the incidents to the development of an adequate transportation system may move forward at once and together.

With an understanding and a frankness which prevails throughout the whole of their brief, learned counsel for appellant, in referring to the recitals contained in paragraph (5), aptly state that they "are in the nature of a preamble which this Court has well denominated as 'a key to open the understanding of a statute.'" Citing *Coosaw Mining Company v. South Carolina*, 144 U. S. 550 (Br. 130). Such a statute is not to be interpreted and executed along restricted and narrow lines when dealing with such a complex and stupendous subject. In *Reduced Rates*, 1922, 68 I. C. C. 676, 733, the Commission said:

In 1921, freight traffic was only slightly more than 10 per cent in excess of that in the year ended June 30, 1915, which was not an unusual year. But the charges for moving freight traffic in 1921 totaled nearly four billion dollars, or about two billion dollars in excess of 1915. Railway operating revenues in 1921 aggregated about $5\frac{1}{2}$ billion dollars, or more than $2\frac{1}{2}$ billion dollars in excess of 1915. If the traffic in 1921 had equaled that indicated as normal by the trend during the 26-year period preceding the war, freight revenues and total railway operating revenues would have exceeded those of 1915 by approximately $2\frac{1}{2}$ billion and $3\frac{1}{2}$ billion dollars, respectively.

In *Wisconsin Railroad Commission v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 565, in the statement of the case, Mr. Chief Justice Taft said:

The Commission had investigated the interstate rates of carriers in the United States, in a proceeding known as *Ex parte 74, Increased Rates*, 58 I. C. C. 220, for the purpose of complying with § 15a of the Interstate Commerce Act as amended by § 422 of the Transportation Act of 1920 (41 Stat. 488). That section requires that the Commission so adjust rates that the revenues of the carriers shall enable them as a whole or by groups to earn a fixed net income on their railway property.

In the *Wisconsin* case paragraphs (3) and (4) of section 13 of section 416 and section 15a of section 422 were assailed as unconstitutional by forty-five states. Rejecting the arguments *in toto*, and sustaining the validity of the act in all respects, this Court, speaking further through the Chief Justice, said (p. 584, 585):

Under Title IV, amendments were made to the Interstate Commerce Act which included § 13, paragraphs 3 and 4, and § 15a, already quoted in the margin. The former for the first time authorizes the Commission to deal directly with intrastate rates where they are unduly discriminating against interstate commerce—a power already indirectly exercised as to persons and localities, with approval of this court in the *Shreveport* and other cases. The latter, the most novel and most important feature of the act, requires the Commission so to prescribe

rates as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation for two years; the return is to be $5\frac{1}{2}$ per cent and $\frac{1}{2}$ per cent for improvements, and thereafter is to be fixed by the Commission.

The act sought to avoid excessive incomes accruing, under the operation of § 15a, to the carrier better circumstanced, by using the excess for loans to the others and for other purposes. The act further put under the control of the Interstate Commerce Commission, 1st, the issuing of future railroad securities by the interstate carriers; 2d, the regulation of their car supply and distribution and the joint use of terminals; and, 3d, their construction of new lines and their abandonment of old lines. The validity of some of these provisions has been questioned. Upon that we express no opinion. We only refer to them to show the scope of the congressional purpose of the act.

It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate

compensation for the particular service rendered and the abolition of rebates. *The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in § 15a to be one of the purposes of the bill.* (Italics ours.)

In *Pennsylvania Railroad v. Railroad Labor Board*, 261 U. S. 72, Title III of the Transportation Act (41 Stat. 456, 469) and the action of the Labor Board thereunder were assailed. The United States Circuit Court of Appeals at Chicago quickly threw the weight of the judicial power back of the statute. This Court, in affirming the decree of the Court of Appeals, and again speaking through Mr. Chief Justice Taft, said (p. 79):

It is evident from a review of Title III of the Transportation Act of 1920 that Congress deems it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes. * * * The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding. * * * The purpose of Congress to promote harmonious relations between the managers of

railways and their employees is seen in every section of this act, and the importance attached by Congress to conferences between them for this purpose is equally obvious (p. 83).

Section 301 of Title III makes it the duty of the carriers, their officers, employees and subordinate officials, to exert every reasonable effort to avoid interruption to the operation of interstate commerce due to a dispute between the carriers and their employees. There again is a recital in the nature of a preamble which operated as the "key to open the understanding of a statute."

In *New England Divisions Case*, 261 U. S. 184, the opinion was announced on the same day as that in the *Labor Board Case*. Seeking to escape from the far-reaching sanctions with which this Court defended the whole Act like a protecting shield, the counsel for the nineteen trunk lines state (Br. 51), that the language of this Court, in referring to the group system of rate making, "Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues," was an inadvertence due to the fact that the provisions of 15a were not litigated in that case and so were not the subject of careful analysis. This assumes that this Court in its weighty opinion in that great case did not weigh its language with precision.

The proceedings before the Interstate Commerce Commission and in the District Court, the arguments in the briefs of counsel and at the bar, and the opinion

of this Court all show that section 15a, practically in its entirety, was involved in the hearings in the *New England Divisions Case*. What this Court said concerning the so-called "recapture clause" and other paragraphs of that section was not inadvertence but squarely within the issues made by the parties. Practically the same arguments now advanced by appellant and the numerous *amici curiæ* went over the dam and beyond rescue in the *New England Divisions Case*. To sustain their contentions or any substantial part of them in the instant case would be to overrule the opinion in the *New England Divisions Case*. It is also noteworthy that the Delaware, Lackawanna & Western, The Chesapeake & Ohio, The Illinois Central, The Lehigh Valley, The Kansas City Southern, The New York, Chicago & St. Louis, The Pere Marquette, and The Wabash companies were all complainants in the *New England Divisions Case* in the unsuccessful attempts in two courts to overthrow the order of the Commission in that case.

In the *New England Divisions Case* this Court, as did the District Court, considered the transportation system as a whole. Mr. Justice Brandeis said (261 U. S. 189):

Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore the effort of Congress had been directed mainly to the prevention

of abuses, particularly those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission new powers were conferred and new duties were imposed.

The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities but for adequate maintenance. On some, continued operation would be impossible unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear. A five per cent increase had been granted in 1914, *Five Per Cent Case*, 31 I. C. C. 351; 32 I. C. C. 325; fifteen per cent in 1917, *Fifteen Per Cent Case*, 45 I. C. C. 303; twenty-five per cent in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous com-

petitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshalling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

Raising joint rates for the benefit of the weak carriers might be the only feasible method of obtaining currently the needed revenues. Local rates might already be so high that a further increase would kill the local traffic. The through joint rates might be so low that they could be raised without proving burdensome. On the other hand, the revenues of

connecting carriers might be ample, so that any increase of their earnings from joint rates would be unjustifiable. Where the through traffic would, under those circumstances, bear an increase of the joint rates, it might be proper to raise them and give to the weak line the whole of the resulting increase in revenue. That, to some extent, may have been the situation in New England, when, in 1920, the Commission was confronted with the duty, under the new section 15a, of raising rates so as to yield a return of substantially 6 per cent on the value of the property used in the transportation service. *Ex parte 74, Increased Rates, 1920*, 58 I. C. C. 220.

The language of this Court with respect to "weak lines," their "prosperous competitors," the "widely varying earning power of the several lines" and "their varying needs," the "recapture from prosperous competitors of surplus revenues," how "the weak were to be helped by preventing needed revenue from passing to prosperous connections," and thus "by marshalling the revenues," it was planned "to distribute augmented earnings" which "would enable the whole transportation system to be maintained" is all highly appropriate here.

Moreover, as the provision concerning divisions was "an *integral part of the machinery* for distributing the funds expected to be raised by the new rate-fixing sections" and was indispensable to that end, so is the provision concerning the recapture of excess earnings an *integral part* of such machinery and like-

wise indispensable. In sustaining the provision concerning divisions as an integral part of such machinery this court took notice of "the situation in New England, when, in 1920, the Commission was confronted with the duty, under the new section 15a, of raising rates so as to yield a rate of substantially 6 per cent of the value of the property used in the transportation service. *Ex parte 74, Increased Rates, 1920*, 58 I. C. C. 220."

What was said in the opinion of the court respecting the scope of the Transportation Act and the various sections thereof was made after full discussion of all of those subjects at the Bar and after most careful consideration by this court. It is submitted that the opinion is just as conclusive of the validity of the recapture paragraphs as if those paragraphs had been the immediate subject of the controversy instead of the so-called divisions paragraphs. If the court thinks otherwise, then it is submitted that the reasoning in the *New England Divisions Case* is so highly persuasive as to be controlling.

In the *New England Divisions Case* the Commission considered the respective needs of the several carriers in the distribution of the revenue after it was acquired by the carriers and before the net railway operating income reached 6 per cent of the value of the railway property held for and used by each carrier in the service of transportation. In the instant case the net has exceeded the 6 per cent. The constitutional rights of the complainant under the Transportation Act have thus been fully

satisfied. The whole controversy is over the overflow. Thus, the questions disposed of in the *New England Divisions Case* reached heights far beyond anything now claimed by the appellant and the *amici curiae* under the recapture clause. If the Congress may authorize the Commission to direct the distribution among the weaker lines of much needed earnings to maintain an adequate transportation system, *a fortiori*, it may direct the recapture of excess earnings of those who have waxed fat under the Transportation Act. Swollen earnings derived from necessarily general rates for transportation which the public must pay are not guaranteed by the Constitution.

VI.

PARAGRAPHS (5) AND (6) MAY NOT BE SEGREGATED FROM THE PARAGRAPHS WHICH HAVE ALREADY BEEN UPHOLD.

In both Houses of Congress the opposition debates waged over section 422, and hammered the so-called guaranty and recapture provisions. The most strenuous opposition was interposed to the former. The records of the Congress will bear the construction that without the recapture provision section 422 would have failed utterly. But reference to the records of Congress is unnecessary. To argue that paragraphs (5) and (6) may now be segregated and adjudged unconstitutional and the so-called guaranty paragraphs allowed to stand is contrary to the whole theory of the Act.

Section 502 provides (41 Stat. 499):

That if any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment has been rendered.

In *Hill v. Wallace*, 259 U. S. 44, 70, this Court, in holding the Future Trading Act, approved August 24, 1921, c. 86, 42 Stat. 187, unconstitutional in practically its entirety, and speaking through Mr. Chief Justice Taft, said:

Section 11 of this act directs that "if any provision of this act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby."

Section 4 with its penalty to secure compliance with these regulations of Boards of Trade is so interwoven with those regulations that they can not be separated. None of them can stand. Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court. In *United States v. Reese*, 92 U. S. 214,

presenting a similar question as to a criminal statute, Chief Justice Waite said (p. 221):

"We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." *Trade-Mark Cases*, 100 U. S. 82; *Butts v. Merchants & Miners Transportation Co.*, 230 U. S. 126.

To be sure, in the cases cited there was no saving provision like § 11, and undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act.

There are sections of the act to which, under § 11, the reasons for our conclusion as

to § 4 and the interwoven regulations do not apply. Such is § 9, authorizing investigations by the Secretary of Agriculture and his publication of results. Section 3 too would not seem to be affected by our conclusion.

In *Connally v. Union Sewer Pipe Co.*, 184 U. S. 540, 565, Mr. Justice Harlan, speaking for the court, said:

The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative.

It can not seriously be argued that paragraphs (3) and (4) of section 13 of the Interstate Commerce Act, as amended by section 416 of the Transportation Act (41 Stat. 484); paragraph (6) of section 15 of the Interstate Commerce Act, as amended by section 418 of the Transportation Act (41 Stat. 484), and Section 15a of the Interstate Commerce Act, as amended by section 422 of the Transportation Act, are not integral parts of the machinery; that is, the raising of the revenues, the fixing of the divisions, and the recapture of the excess earnings all stand together. Opposing counsel, therefore, are wedged between the non-segregation of these several paragraphs on the one

side, and the opinions of this Court in the *Wisconsin Rate Case* and *New England Divisions Case* on the other side.

Moreover, it is conceded that "Paragraphs (2), (3), and (4) of section 15a undoubtedly constitute a regulation of commerce." The argument is that unconstitutionality begins at the point at which the so-called constitutional guaranty stops.

So, notwithstanding Section 502 and the three great decisions already announced, according to arguments of opposing counsel, the question recurs, Is the Transportation Act of 1920 a valid exercise of Congressional power?

VII.

THE FAIR RETURN.

The Commission has found the value of the steam railway property subject to the act and held for and used in the service of transportation at approximately \$18,900,000,000. (*Ex parte 74*, 58 I. C. C. 229.) The exercise of the power of Congress which authorizes the Commission to increase rates to the public so as to earn a net return to each carrier of 6 per cent on the valuation can not in this proceeding be successfully challenged as confiscatory. The history of the act is that it was passed in the public interest which includes the interest of the carriers, and, to quote the language of this court:

It is somewhat strange that that which was done in the interest of the carriers should be brought forward by them to attack the action of the Commission. (218 U. S. 109.)

In *Minnesota Rate Cases*, this Court said (230 U. S. 441) (Northern Pacific):

The total net profits of the company for the fiscal year ending June 30, 1908, from its Minnesota business (interstate and intrastate) was found to be \$5,431,514.56. This was equal to 6.021% on the entire estimated value of the property. (See also 230 U. S. 458.)

And again (230 U. S. 467) (Great Northern):

The Master found that the cost of reproduction new of the entire system was \$457,121,469. The value of the portion of the system in Minnesota was separately found, on the basis of reproduction new, to be \$138,425,291. The net profits of the company during the test year from its Minnesota business, interstate and intrastate, were \$8,180,025.11, equal to 5.909 per cent upon this estimated value.

Finally (230 U. S. 471) (Minneapolis & St. Louis):

It thus appears that the net return from the entire Minnesota business in 1907 was about 4.14 per cent on the estimated value of the property (\$21,608,464) in Minnesota; in 1908, less than 3.5 per cent; and in 1909, less than 3.7 per cent.

As to the Northern Pacific and Great Northern companies the orders of the Railroad Commission and the legislative acts of Minnesota prescribing the maximum rates for freight and a maximum of 2 cents a mile for passengers were sustained; as to the Minneapolis & St. Louis they were annulled as confis-

oatery. It is well known that the Northern Pacific and Great Northern are two of the most prosperous and efficiently managed railroad systems in the country to-day. Neither is contesting the recapture clause and the counsel for the Northern Pacific is openly advocating its validity. Where is the Minneapolis & St. Louis ⁵ with the victory it won in the *Minnesota Rate Cases*?

There are those who contend that if all the railroads were placed in a single system it would be an unconstitutional act for Congress to impose upon them a scheme of rates which would yield less than a fair return upon the aggregate value; that the instant case is not different in principle because of the separation of the railroads into different systems; therefore the recapture clause is invalid because it takes from some roads part of their earnings and leaves to the roads in the aggregate less than the fair return upon the property in the aggregate.

Congress deals with the situation as it finds it. With the railroads divided into separate systems there is no constitutional obligation on Congress to make rates which will yield and leave in the hands of the railroads in the aggregate a fair return on the aggregate value. Take the situation in Minnesota. In that State the legislature fixed passenger rates which were held to be high enough for the Northern Pacific and Great Northern but too low for the Minneapolis & St. Louis. The practical

⁵ W. H. Bremmer, Receiver. (See Official Railway Guide, September, 1923, p. 937.)

effect was that the Minneapolis & St. Louis had to charge the same low rates which were held to be lawful for the other two railroads. It would have been a more liberal rule to the Minneapolis & St. Louis and also to the Northern Pacific and Great Northern if the legislature had fixed rates on the basis of a fair return on the average value of the three properties and had then required the Northern Pacific and Great Northern to account to the Government for one-half of their surplus earnings. Congress considered that this result would be more liberal to all three railroads than the result which was actually realized under the rates which the Supreme Court held were sufficient for the Northern Pacific and Great Northern. It requires courage to claim that the more liberal rule is unconstitutional. The direct effect of the Supreme Court's decision was that it was constitutional to fix the rates for each railroad on the basis of its own rate of return.

Again, it has been said that the true rate-making rule is to make rates upon the basis of the average results of all the carriers, and anything that any carrier earns under this rule is its property and can not be taken away. Courts will not limit in this way the right of Congress to select the means of exercising its constitutional powers. Courts will not declare that any given rule of rate making is the only rule. There is no reason for the courts to say that Congress is prohibited from adopting some other rule of rate making, as, for example, that rates on prosperous roads shall be only such

as will yield them a fair return; in which event competition would force corresponding rates on the weak roads.

It has also been suggested that Congress has not the power to bankrupt the railroads by fixing rates for the prosperous roads which, while constitutional as to them, would, through competitive influences, leave other roads without a fair return. There can be no such operation of the constitutional principle. The Government might buy and operate a railroad between Chicago and New York and might charge exceedingly low rates. This might be disastrous to other railroads, but how could it be said that their property had been taken by legislative enactment without due process of law merely because they, as the result of competition, had been unfavorably affected by an act of the Government which in itself would be entirely lawful?

The court will not and ought not to look at the situation in a vacuum. It will look at it as a practical problem. It will realize that the rule in the Transportation Act was designed to help the transportation situation and did help it. If the railroads had gone back to private control without the specific rate-making rule prescribed in the Transportation Act, no reasonable person will doubt that the railroads could not have increased their rates to anything like the extent they were permitted to increase them under the Transportation Act. If the more fragmentary rules which had theretofore been applied had been applied to the new situation, it is perfectly clear that

the net increase would have been much smaller. It would be surprising if a rule which was intended to be more liberal in practice to the railroads, and which in fact was more liberal to them, should be regarded as unconstitutional, when the rules theretofore in effect of a more fragmentary character and affording less protection to the carriers would be regarded as constitutional.

If there are any carriers which have a constitutional right to object to the rule of the Transportation Act they are the weaker carriers, because the Act makes it practically certain that rates will not be high enough to give them a fair return. But those carriers are not objecting, and in the nature of things will not object, because the rule gives them more than they would otherwise get in practice. And it is impossible to see how carriers which are getting more than they are constitutionally entitled to can say that the rule that gives them that amount is unconstitutional.

Decisions are legion, and Congress took notice of them in enacting the Transportation Act, on the subject of the right of carriers to earn a fair return on the value of the property used in the service of the public. See *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 418; *Reagan v. Farmers L. & Tr. Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466; *Galveston Electric Co. v. Galveston*, 258 U. S. 388; *Minnesota Rate Cases*, *supra*. Likewise with respect to the classification of railroads, *C. B. & Q. R. R. v. Iowa*, 94 U. S. 155; *Grand Trunk v. Wellman*, 143 U. S. 339; *Dow v. Beidelman*, 125 U. S. 680, 688. That

each individual case must rest upon its own peculiar facts and circumstances, see *Covington, etc., Turnpike Co. v. Sandford*, 164 U. S. 578, 597. These are subjects which need not be argued at length.

VIII.

THE RECAPTURE CLAUSE IS FOUNDED ON PRECEDENT.

The principle upon which the recapture clause was founded was not unknown to our law. It is common knowledge that public utilities companies in some of the large cities, such as street car, traction, gas, and electric light, turn over to the municipalities all earnings in excess of certain amounts. Municipal ordinances so providing have frequently been accepted by public utilities.

In *Noble State Bank v. Haskell*, 219 U. S. 104, the Oklahoma act created a State Banking Board with power to levy upon every bank existing under the laws of the State an assessment of five per cent of the bank's average daily deposits, with certain deductions, for the purpose of creating a Depositors' Guaranty Fund. The purpose of the Fund was to secure the full repayment of deposits. If a bank becomes insolvent and goes into the hands of the Bank Commissioner, and its cash immediately available is insufficient to pay depositors in full, the Banking Board is to draw from the Fund (and from additional assessments if required) the amount needed to make up the deficiency. A solvent bank that did not want the help of the Depositors' Guaranty Fund challenged the validity of the act on the ground that

it could not be called upon to contribute toward securing or paying the depositors in other banks consistently with Article I, section 10 of the Constitution, and with the Fourteenth Amendment. This Court sustained the act.

In *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237, 244, 245, the legislature of Washington established a State fund for the compensation of workmen injured and the dependents of workmen killed in employments classed as hazardous; the law was made obligatory upon both employers and employees; the fund was the sole source of compensation and was supplied by assessments upon each employer of definite percentages of his total pay roll. Speaking for the Court, Mr. Justice Pitney, in sustaining the statute, said:

In the present case the Supreme Court of Washington (75 Washington, 581, 583), sustained the law as a legitimate exercise of the police power, referring at the same time to its previous decision in the *Clausen Case*, 65 Washington, 156, 203, 207, which was rested principally upon that power, but also (pp. 203, 207) sustained the charges imposed upon employers engaged in the specified industries as possessing the character of a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purposes of regulation. We are not here concerned with any mere question of construction, nor with any distinction between the police and the taxing powers. The

question whether a State law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operations and effect. *Henderson v. Mayor of New York*, 92 U. S. 259, 268; *Stockard v. Morgan*, 185 U. S. 27, 36; *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 227; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 28, 30; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 162; *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 362. And the Federal Constitution does not require a separate exercise by the States of their powers of regulation and of taxation. *Gundling v. Chicago*, 177 U. S. 183, 189.

Whether this legislation be regarded as a mere exercise of the power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the Fourteenth Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of its validity, and the burden of proof and argument is upon those who seek to overthrow it. *Erie R. R. Co. v. Williams*, 233 U. S. 685, 699. In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily

must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for legislation.

* * * * *

To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when or in what particular plant or industry they will occur, we deem that the State acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it can not be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupa-

tion taxes limited to the actual losses occurring in the respective classes of occupation.

The idea of special excise taxes for regulation and revenue proportioned to the special injury attributable to the activities taxed is not novel. In *Noble State Bank v. Haskell*, 219 U. S. 104, this court sustained an Oklahoma statute which levied upon every bank existing under the laws of the State an assessment of a percentage of the bank's average deposits for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks. There, as here, the collection and distribution of the fund were made a matter of public administration, and the fund was created not by general taxation but by a special imposition in the nature of an occupation tax upon all banks existing under the laws of the State. In *Hendrick v. Maryland*, 235 U. S. 610, 622, and *Kane v. New Jersey*, 242 U. S. 160, 169, we sustained laws of a kind now familiar imposing license fees upon motor vehicles, graduated according to horsepower, so as to secure compensation for the use of improved roadways from a class of users for whose needs they are essential and whose operations over them are peculiarly injurious. And see *Charlotte, Columbia & Augusta R. R. Co. v. Gibbes*, 142 U. S. 386, 394-5, and cases cited. Many of the States have laws protecting the sheep industry by imposing a tax upon dogs in order to create a fund for the remuneration of sheep owners for losses suffered by the killing of their sheep by dogs. And the tax is imposed upon all dog owners, without regard to the question whether their particular dogs

are responsible for the loss of the sheep. Statutes of this character have been sustained by the state courts against attacks based on constitutional grounds. *Morey v. Brown*, 42 N. H. 373, 375; *Tenney, Chairman, v. Lenz*, 16 Wisconsin, 566; *Mitchell v. Williams*, 27 Indiana, 62; *Van Horn v. People*, 46 Michigan, 183, 185, 186; *Longyear v. Buck*, 83 Michigan, 236, 240; *Cole v. Hall, Collector*, 103 Illinois, 30; *Holst v. Roe*, 39 Ohio St. 340, 344; *McGlone, Sheriff, v. Womack*, 129 Kentucky, 274, 283, *et seq.*

Learned counsel argue that the statutory half-and-half division between the Government and the company of the excess earnings is arbitrary; and if sustained it might subsequently be revised and the proportion of the company from time to time so reduced as to reach zero. Similar arguments in other cases have been rejected as irrelevant.

In *Atlantic Coast Line v. Corporation Commission*, 206 U. S. 1, 25, this Court said:

The power to fix rates, it is urged, in the nature of things, is restricted to providing for a reasonable and just rate, and not to compelling the performance of a service for such a rate as would mean the sustaining of an actual loss in doing a particular service. To hold to the contrary, it is argued, would be to admit that a regulation might extend to directing the rendering of a service gratuitously or the performance of first one service and then another and still another at a loss, which could be continued in favor of selected interests until the point was reached where by compliance

with the last of such multiplied orders the sum total of the revenues of a railroad would be reduced below the point of producing a reasonable and adequate return. But these extreme suggestions have no relation to the case in hand.

In *Noble State Bank v. Haskell*, 219 U. S. 104, 112, this Court also said:

It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise.

Likewise the argument may not prevail that appellant, owing to claims and suits for loss and damage, overcharges, etc., may not close records and submit reports of earnings for a specified year because of undetermined liability, as it presents a general administrative question which clearly belongs to the rules and regulations of the Interstate Commerce Commission covering such matters. The Court would not determine such questions in advance of the facts of the particular case.

Opposing counsel try to make much of the language of the District Court that the recapture of the excess earnings was in the nature of a tax. One of the briefs points out that the Interstate Commerce Commission has not become a tax assessor and collector, that as the moneys are not paid into the Treasury by the carriers and paid out by the Treasurer that there is no tax, hence the District Court erred. The tax referred to by Mr. Justice

Brandeis in the *New England Divisions Case*, whose language is quoted in the opinion of the District Court (Tr. 68), is very much the same as the tax referred to by Mr. Justice Pitney in the *Mountain Timber Case* for which he cites authorities. The point does not require further discussion.

There is little in the briefs of opposing counsel which meets the holding of the District Court that appellant never acquired title to the fund as its absolute property but that it holds the same as trustee for the United States.

IX.

THE ARGUMENT THAT THE TRANSPORTATION ACT INTERFERES WITH INTRASTATE COMMERCE HAS ALREADY BEEN REJECTED.

In the original petition (Tr. 13), in argument at the Bar in the District Court, and in their brief in this court (Point IV, p. 99), learned counsel for appellant undertake to make a distinction between appellant's interstate and intrastate commerce. Conclusive against the point is the language of this court in *Wisconsin Rate Case* (257 U. S. 587, 588):

Counsel for appellants are driven by the logic of their position to maintain that the valuation required for the purposes of §15a to be ascertained pursuant to §19a of the Interstate Commerce Act (37 Stat. 701; amended 41 Stat. 493) is to be only of that part of the property and equipment of the interstate carriers which is used in commerce among the States and must be segregated from that used in intrastate commerce. This

is contrary to the construction which since the enactment of §19a, March 1, 1913, the Commission has put upon that section in carrying out its injunction. It is inadmissible. The language of §15a refutes such interpretation. The percentage is to be calculated on "the aggregate value of the railway property of such carriers held for and used in the service of transportation." To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This of itself prevents our giving the words such a construction unless they clearly require it. They certainly do not.

X.

CONCLUSION.

Copiously quoting language from the opinion of this Court in the *New England Divisions Case*, which carried with it reference to *Wisconsin Rate Case*, the District Court sustained the motion of the United States to dismiss the original petition. It builded its house upon the rock of this Court's decisions. We also rest our case upon the same sure foundation. The decree of dismissal appealed from should be affirmed.

JAMES M. BECK,

Solicitor General.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

NOVEMBER 3, 1923.

APPENDIX A.

(Ante p 17.)

Report No. 304, accompanying Senate Bill No. 3288, known as the Railroad Control bill, prepared by Senator Cummins (Iowa), Chairman Senate Committee on Interstate Commerce, November 10, 1919. (Cong. Rec., Vol. 58, Pt. 8, p. 8187.)

Mr. Cummins, from the Committee on Interstate Commerce, submitted the following report (to accompany S. 3288):

Within a few days after the organization of the Committee on Interstate Commerce for this session a subcommittee was appointed to consider the hearings which had been heretofore held upon the railway situation with a view of framing a bill and presenting it to the full committee. The subcommittee held almost continuous sessions for many weeks, and on September 2 the chairman of the committee introduced S. 2906 as the result of the work of the subcommittee. It was referred to the full committee and constituted the report of the subcommittee. Since that time the entire committee has been in session substantially every day, considering S. 2906. The committee concluded its deliberations on October 23, having adopted many amendments, and, thereupon, directed the chairman to introduce a new bill embodying the amendments which had been agreed upon, to have it referred to the Committee on Interstate Commerce, and immediately to report it favorably. This was done, and the present bill, S. 3288, is now on the calendar for disposition by the Senate. The first thought which the committee desires to impress upon the Senate is the importance of an

early consideration of the measure and the establishment of a reasonably permanent status for our systems of transportation. It is unnecessary to enlarge upon the vital part which transportation plays in all the affairs of the country. The health, commerce, peace, prosperity, and growth of the United States are absolutely dependent upon adequate and constantly increasing facilities for transportation. Everybody understands that the existing condition is a temporary one; and, as we draw near the end of Government operation the demoralizing influences multiply. The conceded return of these properties to their owners, within a short time, necessarily destroys or at least seriously impairs the morale of the operating force and it becomes less and less efficient. A still greater difficulty lies in the fact that no plans can be made for future improvements in the way of additions and betterments to meet the growing demands of an expanding commerce. Naturally and properly, the Railroad Administration is disinclined to make expenditures of this character involving the execution of a program which, to be effectual, must be consistent and continuous, and the railroad companies are manifestly incapable of either making or carrying out provisions for the enlargement of their facilities for transportation. The result is a practical suspension of work in this direction. There is no practical way in which the period of partial paralysis can be avoided or prevented; but it is obvious, even to the most casual observer, that the period should be shortened by the most diligent attention on the part of Congress. It is to be hoped, therefore, that the moment the German treaty is disposed of the Senate will take up this bill and devote

itself, without interruption, to its consideration until it adopts whatever legislation may seem necessary to meet the very grave situation which confronts the country.

Before entering upon a review of those parts of the bill which relate to future regulation of interstate carriers and which establish a permanent policy with respect to the relation between the Government and our systems of transportation, it may be both interesting and helpful to explain briefly the method adopted by the bill for the return of the railroads to their owners and for the settlement of the accounts between the Railroad Administration and the railway companies.

The bill repeals the act of March 21, 1918, commonly known as the Federal control act, continuing it only in so far as is required to close up all matters growing out of Federal control. The act takes effect at midnight on the last day of the month in which it becomes a law, and at that time the transfer of the properties in the possession of the Government is to occur. All rights and remedies, both of and against the Government, are preserved. Without commenting in detail upon what these rights are, it may be said that it will be many years before all the matters growing out of Federal control will be adjusted, for the disputes already developed are numerous enough to occupy the attention of the courts for a decade. All that this report will attempt to do in that respect is to present an estimate of the uncontroverted condition as it will probably be on the 1st of January, 1920. The estimate has been prepared and furnished to the committee by the financial or accounting department of the Railroad Administration; but, as Mr. Sherley, who compiled

it, very well indicates, it is only an estimate, for many things may happen before the end of the year to affect it, and the reports for a month or two in the past are not completely analyzed.

To understand fully the financial statement about to be made, it is necessary to refer to the Federal control act under which the Director General of Railroads has been operating about 230,000 miles of our 260,000 miles of railways. Whether the President took possession of all the railways under the act of August 29, 1916, at the beginning of the year 1918 is a subject of controversy into which the committee will not enter at this time. It is sufficient to say that the act of March 21, 1918 (Federal control act), authorized the President to relinquish at any time prior to July 1, 1918, "control of all or any part of any railroad or system of transportation." About July 1 the President exercised this power and relinquished a large number of the shorter lines, retaining, as already suggested, something like 230,000 miles which had been from the 1st day of January, 1918, and still are being operated by the Director General of Railroads.

The Federal control act empowered the President to agree with each carrier whose property was taken over for the payment of a maximum compensation equivalent to its average annual railway operating income for the three years ending June 30, 1917. Upon this basis the aggregate annual compensation for the use of the railways passing into the hands of the Government and retained until the present time is, in round numbers, \$900,000,000. At various times since the passage of the act the President has entered into contracts with the several railway companies, adopting his maximum authority as the

"standard return." With respect to the exact number of contracts so made the committee is not advised, but it has information to the effect that while in the main the larger systems are under contract there are yet quite two-thirds of the whole number of carriers whose property is being operated by the Government which have not signed what is known as the "standard contract." These companies may or may not sign in the future, and if they do not each of them will be entitled to recover from the Government the just compensation which the law may award. With regard to those carriers, very many in number, which claim that their properties were taken over on January 1, 1918, but which were formally relinquished prior to July 1, 1918, they may or may not be entitled to compensation; and they are mentioned only to say that they are not included in the statement of the existing financial relations between the Government and the transportation systems. The Director General has made contracts with some of these carriers, but the committee assumes such contracts have not been made under the authority to agree upon compensation but are merely traffic agreements of the general character that one common carrier may lawfully make with another.

According to the estimate of the Railroad Administration, the net operating income of the systems in the hands of the Government for the two years 1918 and 1919 will be \$551,777,459 less than the compensation to which the carriers are entitled, computed as provided in the law and as prescribed in the standard contract; that is to say, when all accounts have been adjusted and paid the Government will have lost that amount in its two years of operation. It is

the opinion of the committee, without reflecting in any wise upon the Railroad Administration, that in the end the loss will be found to be much greater than the estimate submitted; but, however that may be, it must ultimately be paid from the Treasury of the United States.

As is well known, Congress has appropriated, in all, \$1,250,000,000 for the use of the Railroad Administration. This sum, so far as the committee is advised, has been expended, or will be expended, for the purposes and under the conditions prescribed in the Federal control act.

Assuming that the Government's loss for the two years will be, in round numbers, \$600,000,000, it is obvious that if the railways could pay on December 31 all that they owe the Government, \$650,000,000 of the appropriation would be returned to the Treasury; but that will not be the situation, for it is entirely impossible for the railways to repay out of income the sums which have been advanced by the Government for additions and betterments—expenditures which are ordinarily charged to capital account. It will become necessary for the Government to pay the railways a large part of the compensation in order that the carriers may pay the interest upon their bonds and other fixed charges and make such distribution in the way of dividends as will prevent undue hardship among their stockholders. If the Government retains about \$400,000,000 and applies that sum upon the amount due from the railways on account of additions and betterments, the Government would still carry about \$525,000,000 of the additions and betterments. If, however, it shall carry for future payment all expenditures during the two years for additions and betterments, it

must fund nearly \$950,000,000 on that account alone. If it is also to carry the amount of cash in the hands of carriers on January 1, 1918, taken over by the Government, and the balances in the hands of agents, the amount to be funded would be increased \$383,000,000, making a total substantially of \$1,300,000,000.

The bill before the Senate pursues a middle course with respect to funding the indebtedness due from the carriers to the Government, which is thought to be just both to the public and the railways. Nearly three weeks ago the committee asked the Railroad Administration to furnish a statement applying the provisions of the bill to the settlement of accounts and showing just what the result would be; but, up to this time, the statement has not been received. As soon as it comes in, it will be laid before the Senate.

October 22 the Railroad Administration, through the Director of the Division of Finance, sent to the chairman of the committee a letter which presents the basis of the general conclusions above stated, and it is thought but fair to the committee, and to the administration as well, that it be published as a part of this report. It is as follows:

UNITED STATES RAILROAD
ADMINISTRATION,
DIRECTOR GENERAL OF RAILROADS,
Washington, October 22, 1919.

Hon. A. B. CUMMINS,
United States Senate, Washington, D. C.

MY DEAR SENATOR CUMMINS: Pursuant to my promise of some time ago, and with apology for the necessary delay, I beg to give you below a statement showing, on the basis of the best estimate that we can make at this time, an approximation of the amount that would be needed to defray operating

deficit, the amount that the Railroad Administration will have temporarily tied up in various assets and the additional amount that will be required in order to aid in the liquidation of the affairs of the Railroad Administration.

You understand, of course, that the figures are necessarily tentative because the latest balance sheet of the Railroad Administration is for June 30, 1919, and necessarily the most careful estimates can not possibly disclose the precise facts as they would develop during the last six months, approximately one-half of which is still in the future.

The figures given are upon the assumption that disposition will be made in accordance with the terms of the standard contract. The other possible disposition suggested in amendments proposed to provide for funding a certain amount of the indebtedness of the railroads would naturally present the matter in a different aspect. I shall consider that further on.

In order to enable settlements with the railroad companies at December 31, 1919, it will necessitate the payment to them of approximately \$326,541,893, arrived at as per the following table:

Accounts with the corporations immediately payable at December 31, 1919.

Due the Government:	
Demand loans.....	\$53, 078, 186
Short-term notes.....	75, 553, 167
Open-account balances due Government..	\$220, 053, 510
Less amount not now collectible.....	66, 028, 228
	<hr/> 154, 025, 282
For additions and betterments, other than allocated equipment, financed from income.....	
Allocated equipment financed under general equipment plan.....	370, 381, 494
For additions and betterments financed through open account due company.....	200, 000, 000
	<hr/> 45, 100, 132
Total immediately payable to Government.....	<hr/> 898, 138, 261
Due the corporations:	
Balance due on compensation.....	855, 395, 851
Depreciation and retirements.....	304, 179, 281
Open-account balances due corporations.....	65, 105, 022
	<hr/> 1, 224, 680, 154
Amount needed to be appropriated to enable the Railroad Administration to immediately pay to the corporations the net amount due them..	<hr/> 326, 541, 893

When the Railroad Administration shall have made settlement with the railroad companies in accordance with the foregoing, the situation will be as follows: The Railroad Administration will have expended and there will, in consequence, have been correspondingly consumed or tied up—

1. Amount necessary to defray operating deficit, the difference between the standard rental payable to the railroad companies and the estimated net operating income for the 24 months ended Dec. 31, 1919.....	\$551, 777, 459
2. Amount of cash working capital necessary to leave temporarily with the corporations until the returns from the operation of their properties after Federal control become available.....	
3. Amount of open account due Government by the corporations, representing payments by Government of corporate liabilities which the corporations can not repay at this time.....	357, 943, 276
4. Amount of additions and betterments' expenditures, including equipment, made to the railroad companies' properties during 1918 and 1919, which must be carried by the Railroad Administration for the time being....	66, 028, 228
5. Improvements on inland waterways.....	518, 075, 309
6. Loans during 1918 and 1919 to railroad companies not immediately repayable.....	14, 341, 886
7. Boston & Maine reorganization.....	48, 375, 735
Total.....	20, 000, 000
	1, 576, 541, 893

Appropriations heretofore made and applicable to the foregoing aggregate \$1,250,000,000, so that to discharge its obligations as they exist at December 31, 1919, on the basis of the standard contract, the Railroad Administration will need an additional appropriation, it is estimated at this time, of \$326,541,893.

Concerning the proposal to fund the indebtedness of the railroad companies to the Railroad Administration, it will be noted from the foregoing that a settlement under the contract contemplates that there will have been retained in settlement with the companies, on account of additions and betterments to their properties, the sum of \$415,481,626, and that it is contemplated that even with that deduction from the compensation that the Government, nevertheless, will be carrying \$518,075,309 of additions and betterments which the companies are not able to repay at this time, so that if the whole amount of

the indebtedness for additions and betterments should be funded the above appropriation would have to be increased by the amount of \$415,481,626 and the Government would then be required to fund for additions and betterments the sum of \$933,556,935.

Regarding the proposal of the corporations that the amount of the working capital taken over should also be funded, it is to be observed that at the beginning of Federal control the amount of cash in the hands of the treasurers, so taken over by the Railroad Administration, aggregated \$239,190,605. In addition, the balances in the hands of agents and conductors aggregated \$143,899,424.

If the proposal looks to the furnishing of these amounts in addition to amounts sufficient to pay off the liabilities of the Railroad Administration, that amount would have to be added to the requirements shown above. However, the fact is that the Railroad Administration used such cash and agents' and conductors' balances in liquidating the liabilities of the corporations in the earlier months of Federal control and it is to be assumed that a like process will take place at the end of Federal control.

If, therefore, the Railroad Administration leaves in the hands of the corporations a sufficient amount of working assets to liquidate its liabilities, not all of which must be paid simultaneously with the end of Federal control but which will be liquidated doubtless spreading over a period of from 30 to 90 days (it is true that a considerable part of such liabilities must be met in the first 15 days following the return of the roads to private control and a sufficient amount of cash or other quick assets should be left with the corporations to protect them), it would be ample protection to the corporations in point of working capital and would practically duplicate the situation as it developed when Federal control intervened.

As stated above, the Railroad Administration used the cash assets of the corporations, generally, for the payment of the corporations' liabilities. To the extent that there is a balance in the hands of the Rail-

road Administration, resulting from such transactions, the statement showing the account with the companies on page 2 of this letter, contemplates that such amount will be paid over to the companies except to the extent that any such amounts may be properly applied to the repayment of the indebtedness of the companies to the Railroad Administration.

To the extent that such process resulted in the Railroad Administration paying corporate liabilities in excess of assets, the account on page 2 of this letter contemplates, moreover, the collection thereof from the corporations only in cases where it is practicable for such corporations to make payment thereof from balances of compensation due them.

On this theory, the foregoing indicates that the Government will be required to carry, for the time being, balances due from the corporations on open account aggregating \$66,000,000.

With reference to the amount shown above for working capital temporarily tied up, it should be observed that a considerable part of the assets of the Railroad Administration are represented by items other than cash. For example, traffic balances, accounts receivable, and various unadjusted items, both debit and credit, that are necessarily incident to a business of such magnitude and which can not finally be cleared up short of several months. The amount shown represents the balance between such unsettled assets and unsettled liabilities—the net being the figure which is shown as the amount which the Government will temporarily have tied up as working capital.

If for any cause the plan for a general equipment trust should not be carried out, there will be needed a sum greater than has been set up. How much it is now impossible to foretell. The general equipment trust plan contemplates a repayment to the Government of at least \$200,000,000, which figure has been used in the foregoing statements. In the absence of a general equipment trust plan, some moneys could be immediately secured through equip-

ment trusts of individual carriers. Perhaps something like \$100,000,000 could be obtained in this regard. So that the figure given above, \$326,541,893, might need to be increased by \$100,000,000.

I think it is desirable that I again emphasize the fact that this statement, though made from a somewhat detailed examination of accounts with the respective carriers, of necessity can not be considered as final. The need to forecast events more than two months away of itself introduces elements unstable enough to make conclusions necessarily tentative only.

In addition to that, it should be stated that there are various matters that will only reach adjustment and a status sufficient to enable them to be stated in financial terms after presentation and determination of claims respectively by the Government and the railroads touching many items incident to Federal control. So that in particular the item set out in the foregoing statement under the designation of "Amount necessary to defray operating deficit, etc.," must be considered as subject to considerable change in amount because of the subsequent bringing into it of debits and credits which can not now be even approximated. I am sure that you will appreciate these facts, and I emphasize them simply that a cursory statement of the figures therein submitted may not lead others to erroneous conclusions.

Very truly yours,

SWAGAR SHERLEY,
Director Division of Finance.

(The statement applying the provisions of the bill to the settlement of accounts and showing just what the result would be, heretofore referred to as not having been submitted, was subsequently furnished and is here printed in full, as follows:)

UNITED STATES RAILROAD ADMINISTRATION,
DIRECTOR GENERAL OF RAILROADS,
DIVISION OF FINANCE,
Washington, November 10, 1919.

Swagar Sherley, director; Charles B. Eddy, associate director.

MY DEAR SENATOR CUMMINS:

I am inclosing you herewith the following statements:

Statement A, which purports to show the amount of capital expenditures (exclusive of the cost of allocated equipment) and other indebtedness, that would be funded under the terms of Senate bill 3288.

Statement B, which purports to show the amount of capital expenditures (exclusive of allocated equipment) and other indebtedness, that would be funded under the terms of the section originally submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract.

NOTE.—In order that Statement B may be better understood, the section originally submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract is printed as an appendix to this report.

Statement C, which purports to show the amount of capital expenditures (exclusive of the cost of allocated equipment) and other indebtednesses, that would be funded under the terms of H. R. 10453 (the Esch bill).

Statement D, which purports to show the amount of capital expenditures on account of equipment purchased for the railroads and allocated to them, that is expected will be funded under the national equipment trust plan.

Statement E, which purports to show, in comparative columns, the effect of the refunding provisions in Senate bill 3288 (the Cummins bill), H. R. 10453 (the Esch bill), and amendment suggested by the Division of Finance of the Railroad Administration permitting

offsets in accordance with the standard contract; the statement also shows the amount of moneys which will need to be voted by Congress in order to carry out any one of these plans.

The financial differences shown on these tables between the funding provisions in the House bill and those in the Senate bill are due to the fact that the House bill requires deductions to be made first against indebtednesses other than that which grows out of expenditures chargeable to capital account, whereas the table touching results of the provisions in the Senate bill are, as noted, predicated upon deductions of amounts due on capital account first, and only subsequently upon deductions on account of other indebtedness.

I trust that these will give you the information you desire. To the extent that these figures differ from those in my letter to you of October 22, 1919, it should be stated in explanation that it is due chiefly to the fact that the estimate then hurriedly made had to be the result, in a large measure, of treating as a whole the accounts of the various railroads, whereas the present statement is the result of an elaborate detailed study of the accounts of each of the Class I roads. It should be borne in mind, however, in connection with these statements, as in connection with the previous one, that a large part of the tables submitted are necessarily estimates, as they forecast conditions to the end of the year and are predicated, even as to recent past months, upon estimates rather than upon the actual figures, which are not yet obtainable. They are, however, I believe, substantially accurate.

I regret that the intricacy of the problem, together with the illness of Mr. Parker, has delayed several days the supplying you with this information. I beg to remain,

Most sincerely,

SWAGAR SHERLEY,

Director Division of Finance.

Hon. A. B. CUMMINS,

United States Senate, Washington, D. C.

STATEMENT A.—Amount of capital expenditures, exclusive of the cost of allocated equipment, together with other indebtedness due to the Government from the railroad companies, that would be funded under the terms of S. 3288.

Total cost of additions and betterments which could be funded, exclusive of allocated equipment.....	\$775, 551, 000
Amount which may be deducted therefrom (being the amount due on account of compensation or open account after the payment to railroad of sums sufficient to take care of fixed charges and regular dividends and working capital to the extent that money due permits of it).....	223, 823, 000
Amount of capital expenditures, other than allocated equipment, fundable under terms of bill.....	551, 728, 000
Other indebtedness to be represented by demand notes.....	211, 884, 000
Long-term loans (N. Y., N. H. & H. R. R. and Boston & Maine).....	68, 375, 000
Total indebtedness representing amounts funded and also amounts subject to payment on demand under the terms of the bill (exclusive of allocated equipment).....	831, 987, 000

NOTE 1.—This table is built on the assumption that sums deductible from compensation and open account are applied, first, against capital expenditures rather than against indebtedness due on open account.

NOTE 2.—It is to be noted that this represents consolidation of estimates touching each of the roads, as to some of which there is money due them on open account, but as to most of which there is money due from them to the Government on open account.

NOTE 3.—This statement presumes the payment to the railroads of sums over and beyond their need for fixed charges and regular dividends of \$321,815,000, as available for working capital. The estimated amount that would be needed by the railroads as working capital, if each road were given working capital on the basis of one month's operating expenses, would be approximately \$353,000,000. The provisions of the bill provide, however, not that the roads shall be furnished with working capital, but only that deductions shall not be made from the sums to be funded unless working capital shall have been provided. The credits due the various railroads out of compensation and otherwise, after paying fixed charges, when worked out for the various roads, do not permit of additional payments in a sum greater than \$321,815,000, which, therefore, is the amount

of working capital that the roads would receive after compliance with the terms of the bill. This means that some roads would get a sum equal to a full month's operating expenses as working capital, whereas some roads would not receive any working capital under this plan, and this latter class would be those roads most in need of working capital.

STATEMENT B.—*Amount of capital expenditures, exclusive of the cost of allocated equipment, together with other indebtednesses due to the Government from the railroad companies that would be funded under the terms of the section submitted by the Division of Finance of the Railroad Administration, permitting offsets in accordance with the provisions of the standard contract.*

Total cost of additions and betterments which could be funded, exclusive of allocated equipment.....	\$775, 551, 000
Amount which may be deducted therefrom (being the amount due on account of compensation or open account after the payment to railroads of sums sufficient to take care of fixed charges and regular dividends).....	415, 016, 000
Amount of capital expenditures, other than allocated equipment, fundable as permitted under the standard contract..	360, 535, 000
Long-term loans (N. Y., N. H. & H. R. R. and Boston & Maine).....	68, 375, 000
Other indebtedness, etc.....	158, 646, 000
Total amounts to be funded (exclusive of allocated equipment).....	587, 556, 000

It is to be noted that under the terms of the standard contract, in addition to the amount of \$360,535,000 to be funded, there would be indebtedness of the railroads to the Government to be evidenced by demand notes of the sum of \$158,646,000, indebtedness on account of long-term loans to the New York, New Haven & Hartford Railroad and the Boston & Maine Railroad and other companies of \$68,375,000; or a total of funded and demand indebtedness of \$587,556,000.

NOTE 1.—This table is built on the assumption that sums deductible from compensation and open account are applied, first, against capital expenditures rather than against indebtednesses due on open account.

NOTE 2.—It is to be noted that this represents consolidation of estimates touching each of the

roads, as to some of which there is money due them on open account, but as to most of which there is money due from them to the Government on open account.

STATEMENT C.—*Amount of capital expenditures, exclusive of the cost of allocated equipment, together with other indebtedness due to the Government from the railroad companies, that would be funded under the terms of H. R. 10453.*

Total cost of additions and betterments which could be funded, exclusive of allocated equipment.....	\$775, 551, 000
Amount which may be deducted therefrom (being the amount due on account of compensation or open account after the payment to railroads of sums sufficient to take care of fixed charges, regular dividends, and working capital to the extent that money due permits of it).....	133, 911, 000
Amount of capital expenditures, other than allocated equipment, fundable as permitted under the standard contract..	641, 640, 000
Long-term loans (including New York, New Haven & Hartford and Boston & Maine).....	68, 375, 000
Other indebtedness, etc.....	69, 876, 000
Total amounts to be funded, exclusive of allocated equipment.....	779, 891, 000

It is to be noted that under the terms of H. R. 10453, in addition to the amount of \$641,640,000 to be funded, there would be indebtedness of the railroads to the Government to be evidenced by demand notes of the sum of \$69,876,000; indebtedness on account of long-term loans to the New York, New Haven & Hartford Railroad and Boston & Maine, and other companies, of \$68,375,000, or a total of funded and demand indebtedness of \$779,891,000.

NOTE 1.—This table is built on the assumption that sums deductible from compensation and open account are applied, first, against indebtedness due on open account rather than against capital expenditures.

NOTE 2.—It is to be noted that this represents consolidation of estimates touching each of the roads, as to some of which there is money due them on open account, but as to most of which there is money due from them to the Government on open account.

NOTE 3.—This statement presumes the payment to the railroads of sums over and beyond their need for fixed charges and regular dividends of \$279,000,000 as available for working capital. The estimated

amount that would be needed by the railroads as working capital if each road were given working capital on the basis of one month's operating expenses would be approximately \$353,000,000. The provisions of the bill provide, however, not that the roads shall be furnished with working capital but only that deductions shall not be made from the sums to be funded unless working capital shall have been provided. The credits due the various railroads out of compensation and otherwise, after paying fixed charges, when worked out for the various roads do not permit of additional payments in a sum greater than \$279,000,000. This, therefore, is the amount of working capital that the roads would receive after compliance with the terms of the bill, which means that some roads would get a sum equal to a full month's operating expenses as working capital, whereas some roads would not receive any working capital under this plan, and this latter class would be those roads most in need of working capital.

STATEMENT D.—*Amount of capital expenditures on account of equipment purchased for the railroads and allocated to them that it is expected will be funded under the national equipment trust plan.*

Total cost of 100,000 cars and 1,930 locomotives.....	\$372, 000, 000
Cash to be received through the sale of equipment-trust certificates to the public.....	200, 000, 000

Amount to be represented by equipment obligations held by the Government, secondary to those in the hands of the public, and to be payable in 15 installments.....	172, 000, 000
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NOTE 1.—This table is predicated upon the carrying out of the national equipment-trust plan, and represents what is believed to be a conservative statement as to the amount of cash immediately available from such plan. It is impossible at this time to state more definitely the amount to be carried of the cost of this equipment, due to the fact that something under 10 per cent of the cars purchased have not yet been finally accepted by the railroads.

NOTE 2.—If the national equipment-trust plan should not be carried through, and separate equip-

ment trusts should be created for the financing of the obligations of the respective roads, it is likely that the Government would realize immediately in cash about \$100,000,000 instead of \$200,000,000, and correspondingly carry over a 15-year period some \$272,000,000 rather than \$172,000,000, in which event the moneys needed to be appropriated, as set out in Table E, would have to be increased by approximately \$100,000,000.

STATEMENT E.—*Comparison of amounts to be funded.*

[(1) Under the provisions of Senate bill No. 3288. (2) Under the provisions of H. R. 10453. (3) Under the provisions of the section originally submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract.]

Class I roads.	Senate bill No. 3288.	H. R. 10453.	Standard contract.
1. Total cost of additions and betterments (excluding allocated equipment).....	\$775,551,000	\$775,551,000	\$775,551,000
2. Amount that may be deducted therefrom account compensation or open account due company.....	223,823,000	133,911,000	415,016,000
3. Net amount of additions and betterments (excluding allocated equipment) to be funded..	551,728,000	641,640,000	360,535,000
4. Open account due Government, to be evidenced by demand notes.....	158,884,000	16,876,000	105,646,000
5. Long-term loans (including N. Y., N. H. & H. R. R. and Boston & Maine).....	68,375,000	68,375,000	68,375,000
OTHER PROPERTIES.			
6. Additions and betterments and open account due Government, to be funded.....	53,000,000	53,000,000	53,000,000
7. Total amount of funded and demand indebtedness (exclusive of allocated equipment).....	831,987,000	779,801,000	587,556,000
OTHER REQUIREMENTS.			
8. Allocated equipment not covered by equipment trust.....	172,345,000	172,345,000	172,345,000
9. Additions and betterments—inland waterways.....	14,342,000	14,342,000	14,342,000
10. Operating loss—24 months—all properties (note 2).....	646,777,000	646,777,000	646,777,000
11. Total requirements.....	1,665,451,000	1,613,355,000	1,421,020,000
12. Appropriations already made.....	1,220,000,000	1,230,000,000	1,250,000,000
13. Appropriations now required (note 1).....	445,451,000	383,355,000	171,000,000

NOTE 1.—The foregoing estimate is predicated upon the conversion into cash of all assets of the Railroad Administration, other than those shown above as being carried. In point of fact, in dealing with figures as large as these and matters as complicated, it will necessarily follow that there will be a considerable amount of assets of the Government subsequently convertible into cash that can not be

immediately realized, or even realized contemporaneously with the need of paying out on account of liabilities of the Government.

It is safe to estimate that this amount will be at least \$200,000,000, so that, practically, to carry out the requirements under the Senate or House bill, or the substitute proposal in accordance with the existing standard contract, the Congress should appropriate a sum at least \$200,000,000 in excess of that stated in item 13.

NOTE 2.—The operating loss shown above represents an estimate for the two years of Federal control of the amount by which the net operating income of the railroads fell short of the standard return, estimated amount of interest on accounts due from the Government to the railroad companies, and on accounts due from the railroad companies to the Government; and is predicated on the present basis of earnings, the latest available figures on an actual basis being for the month of August, 1919, so that for the last four months the figures are necessarily speculative.

The operating loss also includes an estimate of \$95,000,000 on account of adjustment of materials and supplies, under provisions of the standard contract. It should be added that beyond these things there are various matters that will reach adjustment and a status sufficient to enable them to be stated in money only after presentation and determination of claims, respectively, by the Government and the railroads, touching many items incident to Federal control; so that in particular the item of operating loss must be considered as subject to considerable change in amount because of the subsequent bringing into it of debits and credits which can not now even be approximated.

APPENDIX.

The proposition submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract is as follows:

Any indebtedness of any carrier to the United States incurred for additions and betterments to roadway and structures, or betterments to equipment, made during Federal control and properly chargeable to capital account, which may exist at the time Federal control is relinquished, and after applying against it such indebtedness of the United States to such carrier as is permitted under any contract now or hereafter made between such carrier and the United States, or, where no such contract exists, as would be permitted by the terms of the standard contract between the United States and the carriers relative to deductions from compensation (sec. 7, par. b, of the standard contract), shall be payable, at the request of the carrier, in 10 equal, annual installments, the first one at the expiration of one year after the termination of Federal control, and one at the end of each year thereafter until all are paid, with interest at the rate of 6 per cent per annum, payable semiannually: *Provided, however,* That any carrier obtaining the funding of such indebtedness as aforesaid shall give, in the discretion of the President, such security in such form and upon such terms as he may prescribe, to insure the faithful and punctual payment by it of the principal and interest under the funding arrangement herein above permitted. Any other indebtedness of any such carrier to the United States which may exist after the settlement of accounts between the United States and the carrier shall be evidenced by notes payable on demand, with interest at the rate of 6 per cent per annum, and secured by such collateral as the President may deem it advisable to require.

With respect to any bonds, notes, or other securities acquired under the provisions of this section or under the provisions of said act of March 21, 1918, the President shall have the right to make such arrangements for extension of the time of payment or for the exchange of any of them for other securities, or partly for cash and partly for securities, as may be provided for in any agreement entered into by him or as may in his judgment seem desirable.

The President shall have the right, at all reasonable times until the affairs of Federal control have been concluded, to inspect the property and records of all carriers at any time under Federal control, whenever necessary or proper to protect the interests of the United States, or to supervise matters being handled for the United States by agents of the carriers, or to secure information concerning matters arising during Federal control, and the said carriers shall provide all reasonable facilities therefor.

Said carriers shall, upon the request of the President or those duly authorized by him, furnish all necessary and proper information and reports compiled from the records made or kept during the period of Federal control affecting their respective lines.

All powers invested in the President by this act, except those contained in section 7, may be executed by him through such officers, agents, or agencies as he may from time to time appoint.

All unexpended balances of money heretofore appropriated in the said act of March 21, 1918, or in the act of June 30, 1919, entitled "An act to supply a deficiency in the appropriation for carrying out the act entitled 'An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' approved March 21, 1918," are hereby reappropriated and made available until expended in the manner authorized in the said act of March 21, 1918, for the purpose therein and herein specified and of adjusting, settling, liquidating, and winding up all matters of whatsoever nature, including compensation, arising out of or incident to Federal control, and all moneys derived from the operation of the carriers, or otherwise arising out of Federal control, and all moneys that have been or may be received in payment of indebtedness of any carrier to the United States arising out of Federal control shall be and remain available until expended for the purposes aforesaid.

THE POLICY ESTABLISHED BY THE BILL FOR FUTURE
CONTROL AND REGULATION.

Having made clear, as it is hoped, the terms upon which the railways are to be returned to their owners for private operation under public control and regulation, the committee advances to those parts of the bill which create the permanent system for such control and regulation. In considering this phase of the subject, it should be constantly borne in mind that if our policy is to be private operation of the instrumentalities of transportation there must be a large and constant inflow of capital. As commerce increases in volume, the facilities of transportation must increase; and, without reckoning the funds which must be secured to discharge maturing obligations already in existence, it will be conceded by everybody that immense sums will be required from year to year for new construction, additional equipment, and necessary improvement. The capital thus demanded must be drawn from those who have money to invest, and, of course, it must be voluntarily contributed. If the people who have money will not invest it in the transportation enterprise, private ownership and operation under public control must necessarily fail. It is apparent, therefore, that any legislation which may be proposed upon the hypothesis of private ownership and operation must tender to the future investor reasonable security for the investment he is asked to make and reasonable assurance of such yearly return upon his money as will induce him to enter the field. The better the security and the more certain the return, the less will be the rate required to attract the investment.

It is here that our present system of regulation has failed. Taking the railways as they are, with their widely varying conditions, both of construction and environment, it is wholly impossible for the Interstate Commerce Commission, no matter how wise and faithful its members may be, to prescribe schedules of charges for transportation that will be, at the same time, just to the public and that will maintain the railways which must continue to function if the people of the country are to be provided with adequate transportation. In a given competitive area the rates which will furnish one company a grossly excessive income will lead another into bankruptcy. The writer of this report is firmly convinced that when the Government assumed the operation of the railways they were, taken as a whole, earning all they should be permitted to earn; but, in the inevitable distribution of these earnings among the various railway companies, the railways which carried 30 per cent of the traffic were earning so little that they could not, by any economy or good management, sustain themselves. Nevertheless, it is unthinkable that these highways of commerce shall be abandoned, and some system must be devised not only for their continuance but for their betterment and growth. Government ownership would solve the problem, but it is the judgment of the committee that Government operation is attended with so many disadvantages—notably in the increased cost of operation—that this plan must be discarded. There is but one other solution. It is consolidation, and here two policies at once present themselves. The first, complete consolidation into one ownership; second, consolidation into comparatively few com-

petitive systems. The first has some advantages over the second, but it has some disadvantages, and the disadvantages outweigh, in the opinion of the committee, the advantages.

The superior efficiency of several systems need not be enumerated at length, but there is one consideration to which attention should be called: Competition, not in rates or charges but in service, will do more to strengthen and make public regulation successful than any other element which can be introduced into the business of transportation. Honorable rivalry among men is the most powerful stimulus known to human effort. For this reason largely the committee, recognizing the necessity for consolidation, determined in favor of the gradual unification of the railways into not less than 20 nor more than 35 systems; not regional or zone systems but systems that will preserve substantially existing channels of commerce and full competition in service. In the grouping of the railways into these systems another vital rule is to be observed, namely, that they are to be so divided that the operating incomes of the several consolidated companies will bear substantially the same relation to the value of their respective properties held for and used in transportation.

The procedure for bringing about the proposed consolidation may now be considered. The bill creates a transportation board, with large duties and powers, which will be more fully explained hereafter. It is mentioned now only because it is the governmental agency through which consolidation is to take place. Section 9 declares the policy of consolidation, prescribing that as soon as practicable and in the manner provided for in the act the railways of the

continental United States shall be divided in ownership and for operation into not less than 20 nor more than 35 separate and distinct systems, each of said systems to be owned and operated by a distinct corporation organized or reorganized under the act. Section 9 concludes:

In the aforesaid division of the said railways into such systems competition shall be preserved as fully as possible, and wherever practicable the existing routes and channels of trade and commerce shall be maintained. The several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the value of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of the railway properties involved in the comparison.

Especial attention is directed to the sentence last quoted, for it expresses the object to be attained; and until it is attained rate regulation can not be fully equitable to both the public and the carriers.

Immediately upon its organization the transportation board is to prepare and adopt a tentative plan for consolidation. The plan is to be submitted to a public hearing, at which it is assumed that all persons in interest will appear. After the hearings are concluded, a final plan is to be adopted and submitted to the Interstate Commerce Commission for its approval. This arrangement will make known to the whole country the consolidations which must eventually occur. Section 12 presents the authority for the reorganization of existing railway corporations, and all consolidations must be either through a reorganized railway corporation or one originally

organized under the terms of the act. It is to be noted, also, that if a partial and voluntary consolidation is carried into effect it must be in harmony with and in furtherance of the complete plan established by the board. Sections 21 and 22 provide for the original incorporation of railway companies; and, concerning this part of the bill, it need only be remarked that any such corporation must be organized "for a specific and defined purpose, namely, the ownership, maintenance, and operation of one of the railway systems or for the construction, ownership, maintenance, and operation of new lines or systems into which the railways of the United States are to be divided by the aforesaid board."

For the period of seven years after the act becomes a law voluntary consolidations are authorized under the strictest supervision by either the board or the commission. The distinctive feature of the voluntary as well as the involuntary consolidations is that the capitalization is not to exceed the actual value of the property held for or used in the transportation service. One of the chief causes leading to the public distrust of railway financing is the deep conviction on the part of the people that the present capitalization of many of the railways grossly exceeds the real value of the property which renders the service. When the Interstate Commerce Commission finishes the valuation in which it is engaged and when those values, as they are judicially determined and only those values, pass into the capitalization of the newly organized or reorganized corporations under this act, that serious obstacle in the way of effective regulation will have disappeared.

At the end of seven years after the passage of the act the compulsory consolidation begins. It is car-

ried out as provided in section 13. If, during the seven years, voluntary consolidation has accomplished the purpose, this section, of course, will not be operative; but, during the voluntary period, its presence in the law will be a compelling force which, in the judgment of the committee, will stimulate the present railway companies to carry forward the declared policy of Congress.

The full advantages of the proposed policy of consolidation can not be secured for 10 or 12 years. The railways must be returned to their owners at once. This situation makes it necessary to provide a plan for immediate relief that will tend at least to overcome the difficulties confronting us and render private operation possible.

A REVIEW OF THIS PLAN.

In this regard the bill attempts to accomplish three results:

First. By prescribing a basis of return upon the value of the railway property, to give such assurance to investors as will incline them to look with favor upon railway securities; that is to say, by making a moderate return reasonably certain to establish credit for the carriers.

Second. In making the return fairly certain to secure for the public a lower capital charge than would otherwise be necessary.

Third. In requiring some carriers, which under any given body of rates will earn more than a fair return, to pay the excess to the Government and in so using this excess that transportation facilities or credit can be furnished to the weaker carriers and thus help to maintain the general system of transportation.

To bring about these results, section 4 requires the Interstate Commerce Commission immediately to divide the country into rate districts, having in view the similarity or dissimilarity of transportation and traffic conditions therein and to institute hearings to determine the adequacy of the rates in any such district from the revenue standpoint and considered as a whole. The rule to be applied in passing upon such issues is announced in section 6, wherein it is stated that the rates shall be so adjusted "as nearly as may be so that the railway carriers as a whole allocated to each district and subject to this act shall earn an aggregate annual net railway operating income equal, as nearly as may be, to $5\frac{1}{2}$ per centum upon the aggregate value, as determined in accordance with the provisions hereof, of the railway property of such carriers in the district held for and used in the service of transportation." To this basis the Commission is authorized to add, in its discretion, one-half of 1 per cent upon this value as a current contribution to improvements, betterments, or equipment unproductive in character, but which are customarily charged to capital account. This part of the revenue, however, if raised at all, is, in the future, not to be capitalized by any carrier whose net railway operating income for the year is more than the basis adopted; namely, $5\frac{1}{2}$ per cent.

The basis thus established has been the subject of much criticism. On the one hand, it is asserted by the carriers that it is too low and will not enable them to obtain the money which they must have in order to develop their properties and provide further transportation facilities which the country demands. On the other hand, it is asserted with equal emphasis by some advocates representing the shippers that the

basis is too high and will give the carriers a greater revenue than they need or ought to have. There were differences of opinion in the committee with respect to the matter, and it is but fair to say that the basis presented is a compromise of these differences. It is believed, however, that both sides of the controversy somewhat exaggerate the facts, or rather fail to take into consideration all the facts which influence the subject. In reaching a conclusion it ought to be borne in mind that the property to which the basis is to be applied is railway property only; that is, the property which renders the service of transportation. All outside investments by railway companies are excluded. Further, in valuing these properties the commission is to be guided by the rules of the law and is not bound by either capitalization or by what is commonly known in the accounting system of the commission as "property investment accounts."

Those who insist so earnestly that the basis will provide insufficient revenue generally ignore the fact that at the present time there are outstanding more than eleven billions of railway bonds which bear an average interest of about $4\frac{1}{2}$ per cent, and on that part of the value of the property the carriers will save 1 per cent. It must also be remembered that the $5\frac{1}{2}$ per cent basis for a rate district will not give to each carrier in that district $5\frac{1}{2}$ per cent upon the value of its property. To some carriers the return will be much higher and to others correspondingly lower. To illustrate: In the test period for ascertaining compensation under the act of March 21, 1918, the average net annual operating income of the class I railways was 5.2 per cent upon the aggregate property investment account. There are, however, wide differences

when the individual carriers are considered. Under this average, the New York Central System earned 6.09; the Pennsylvania Co., 6.26; the Pennsylvania Railroad, 5.36; the Delaware & Lackawanna, 7.54; the Erie, 3.56; the Baltimore & Ohio, 4.67; the Chicago, Burlington & Quincy, 7.02; the Chicago & North Western, 6.13; the Missouri Pacific, 4.43; the Union Pacific, 6.72; the Southern Pacific, 4.99; the Northern Pacific, 6.27; the Great Northern, 6.70; Atchison, Topeka & Santa Fe, 6.16; Chicago, Milwaukee & St. Paul, 4.71; Chicago, Rock Island & Pacific, 4.72; Chicago Great Western, 1.77; Chicago & Alton, 2.64; Western Pacific, 2.28; Colorado Southern, 3.04; Missouri, Kansas & Texas, 2.81; Texas Pacific, 3.76; Wabash, 2.91; Western Maryland, 2.58; New York, New Haven & Hartford, 5.96; Boston & Maine, 4.80; Cincinnati, Hamilton & Dayton, 1.95; Atlantic Coast Line, 5.76; Seaboard Air Line, 3.68; Southern Railway, 4.12; Louisville & Nashville, 6.32; Illinois Central, 5.48.

The basis adopted by the committee is three-tenths of 1 per cent higher than the basis of the test period; and, assuming, though not conceding, that the value of the property is equal to the aggregate of the property investment accounts, it will yield for all the railways a net operating income of \$54,000,000 in excess of the income of the test period.

There were two considerations which led the majority of the committee to believe that this increase is not only warranted but necessary.

First. The railways are being returned to their owners when everything is unsettled and abnormal; when there is suspicion and distrust everywhere. Just what rate of return will enable the carriers to finance themselves under such conditions can not, with certainty,

be determined. It was therefore felt that some increase over the pre-war period is justifiable.

Second. As compared with all kinds of commodities, money is much less valuable than it was a few years ago, and it would seem to be only fair that the returns from railway investments should be reasonably advanced.

The committee, however, recognized that the present situation may be temporary, and that in the course of time the country may be restored to something like its former circumstances, and it provided for this very probable change in the last paragraph of section 6, as follows:

That in the year 1925 and in every fifth year thereafter the commission shall determine what, under the conditions then existing, constitutes a fair return upon the value of such railway property, and it may increase or decrease the $5\frac{1}{2}$ per centum basis herein prescribed, or the basis for the determination of excess income.

These are the reasons, in chief and in brief, which convinced the committee that the $5\frac{1}{2}$ per cent basis for computing the annual operating income of the carriers is fair and just, both to the public and the railway corporations.

It is obvious that if the law gives to the carriers the assurance of income heretofore mentioned there should be a maximum beyond which an individual carrier shall not be permitted to retain for its own use all it may receive under a given body of rates. Referring to the illustrations already given, it is seen that with uniform rates, and they must be uniform in competitive territories, one carrier will receive an operating income of 2 per cent, another 4 per cent, another 6 per cent, another 8 per cent, and others

still more. The bill fixes a standard of excess income and requires the carriers which receive an excess income (which will hereafter be explained in detail) to pay the excess to the transportation board for uses that have been mentioned and which will be more fully stated in a subsequent paragraph of this report.

Upon this requirement there has been a long-continued and earnest controversy before the committee. It has been contended by eminent lawyers that the provision is unconstitutional in that it takes property without compensation. It has been urged by equally eminent lawyers, and probably more of them, that it is not only constitutional but absolutely necessary if private ownership and operation are to be continued. It would unduly prolong this report to enter upon a review of the authorities or an argument which would embrace all the considerations which are material to the question. It is sufficient to say that a large majority of the members of the committee entertain no doubt with respect to the authority of Congress in establishing this policy. Heretofore the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint. It is the duty of the Government so to exercise its power of regulating commerce among the States and with foreign nations that all parts of a common country shall enjoy adequate transportation facilities at the lowest cost consistent with fairness to the capital invested and to the men who manage and operate these facilities. The commerce of one community, in these days, is deeply involved in the commerce of

every community in the land. All the railways we have, or substantially all, must be maintained; and, from time to time, they must be enlarged and additional facilities must be provided.

If the lawyers who insist that taking excess income is unconstitutional are right in their premises, their conclusion would be unassailable. They assume that all the earnings of a given railway under a prescribed body of rates become the absolute property of the carrier which receives them. This is not true under the system which the bill creates; and, therefore, the conclusion is unsound. If there were but one railway in the country, it would be entirely possible for the regulating commission to fix rates for it under which it could not earn more than 6 or 7 per cent upon the value of its property, but we have a thousand railways; and rates for transportation must be fixed with reference to all of them and to the needs of the people to whom all of them render their service. These conditions make it utterly impossible to fix rates which are reasonable for one carrier, considered apart from all the remainder. It is therefore in the competence of Congress to declare that the income which any particular carrier receives beyond a fair return upon the value of its property, it receives as a trustee for the public and not as its own absolute property. If this analysis of the power of regulation is not sustained, then the authority granted in the Constitution is a mere delusion.

With reference to excess income, the bill provides that any carrier receiving a net railway-operating income in any year of more than 6 per cent upon the value of its property, one-half of the excess between 6 and 7 per cent is to be placed in a company reserve fund, and the remaining one-half is to be paid to the transportation board. Of any excess above 7 per cent, one-fourth is to be placed in the company

reserve fund, and the remaining three-fourths is to be paid to the board. When the reserve fund equals 5 per cent of the value of the railway property and is maintained at that amount, one-third of the excess above 6 per cent is to be at the disposition of the carrier for any proper purpose, and two-thirds is to be paid to the board.

The company reserve fund may be drawn upon by the carrier whenever its annual net railway operating income falls below 6 per cent of the value of its property. The reserve fund is, of course, the absolute property of the carrier; and the purpose in requiring it to be created and maintained is to give stability to the credit of the carrier and enable it to render more efficiently the public service in which it is engaged.

The sums which are to be paid to the transportation board are to be placed in a general railroad contingent fund, which is to be used by the board, together with all its accretions, "in furtherance of the public interest in railway transportation," "in avoiding congestions, interruptions, or hindrances to the railway service of the United States," or "in furthering the public service rendered by them (carriers), either by way of purchase, lease, or rental of transportation equipment and facilities to be used by such carriers whenever the public interest may require or by way of loans to such carriers, upon such fair and reasonable terms and conditions in either case as the board may prescribe."

THE TRANSPORTATION BOARD.

Section 7 creates a new public authority for the regulation of commerce. Its title is "Transportation Board." It is to be composed of five members, until

the consolidation heretofore mentioned is complete and, thereafter, of three members. It is unnecessary to recite the details of its organization, for the bill itself is clear and explicit.

The first duty of the board is to prepare and, after hearing, adopt the plan of consolidation, which has been already fully set forth. Its general powers with respect to transportation are stated in the latter part of section 10, and these include certain functions now exercised by the Interstate Commerce Commission, among which may be mentioned the following: (a) The administration of the car service act; (b) of the safety appliance acts; (c) of the hours of service act; (d) of the locomotive boiler inspection act; and others of like character. It is also charged with a series of important duties relating to water transportation, mainly by way of investigation but leading to most important results. The committee hopes that this part of the bill will be carefully examined, for it is the first real recognition of the coordination of water and land transportation which must eventually be accomplished.

Section 11 confers further powers upon the board. These powers are new to our system of regulation, but are considered by the committee as essential. They look toward unification in operation where conditions demand either a diversion of traffic or a common use of facilities.

In section 24 the board is also given control over the issuance of railway securities. It is deemed unnecessary to enlarge upon this subject, because it has been so often before Congress that we are all familiar with it in a general way. The car service act, which is to be administered by the board, is

greatly enlarged; and, as now proposed to be amended, will be found in section 34. The thirteenth paragraph of section 6 of the act to regulate commerce is amended in important particulars, and the administration of that paragraph is given to the board.

Section 45, an entirely new regulation, which is intended to increase our export and coastwise trade by making it easier for the interior shipper to avail himself of the ocean routes, is to be administered by the board.

Having thus indicated the chief duties and powers of the transportation board under the bill, it may be helpful to state some of the reasons which led the committee to the conclusion that it is wise to create this additional tribunal in our regulatory system instead of committing to the Interstate Commerce Commission all the new duties and leaving with it all its present duties.

Every member of the Senate knows that the Interstate Commerce Commission is the most overworked body of men in the Government of the United States; its members are able and industrious, and they labor continuously from the beginning to the end of the year. Nevertheless, they can not keep pace with the demands already made upon them, and, oftentimes, justice delayed is justice denied. The bill the committee has presented increases tremendously the work which some body of men must do if its provisions are promptly carried into effect. It was apparent to the committee that it must adopt one of two alternatives: It must either recommend a very considerable enlargement of the commission, with such division into sections as would permit independent action; or it must recommend the creation of a distinct body. It chose the latter alternative. In

determining the division of work, power, and responsibility as between the two bodies, the committee has traced a clear, obvious line. It has not been able, always, to observe the exact distinction; but, in the main, it has succeeded in doing so.

The bill leaves with the Interstate Commerce Commission the quasi-judicial powers; that is to say, everything pertaining to rates and rate making will be as heretofore in the hands of the commission. The valuation of railway property, under the act of 1913, remains with the commission. The accounting or reporting system is to be conducted by the commission as inseparable from rate making. There are many other and most important duties to be performed by the commission, so many, indeed, that the committee has some doubt whether it will be able to do its work promptly. These, however, need not be specified, as a reading of the bill and a familiarity with the existing law will disclose them. The transportation board is given, chiefly, the powers which are more nearly and directly connected with the physical operation of the railways and the issuance of securities, power over the things tending for safety, both to employees and the public. It is believed that the division of powers and duties has been so adjusted that opportunity for conflict or discord is practically excluded. It may be here remarked that one of the most vital powers given to the board relates to the settlement or adjudication of disputes between railway employers and employees; but this part of the bill deserves separate consideration and to that subject the committee now invites your attention.

LABOR PROVISIONS.

It is not necessary to enter upon the details of the establishment of the tribunals created for the adjudication of demands, disputes, and controversies which may arise from time to time between railway corporations and railway employees. These provisions will be found in sections 25, 26, 27, and 28 of the bill. It is sufficient to say that there are to be appointed three regional boards of adjustment and a committee of wages and working conditions. These four tribunals, made up in each instance of an equal number of men nominated by railway crafts and railway corporations, have original jurisdiction of all complaints, demands, disputes, and controversies between employers and employees which are not adjusted or settled between the parties themselves. In the event of the failure of these boards of adjustment or the committee of wages and working conditions to reach a decision, the transportation board has final authority; and, indeed, all decisions of these boards or the committee must be approved by the transportation board. It is intended in these sections to bring into existence governmental tribunals so composed that in so far as mortal man can do justice there will be complete, impartial justice done to both railway corporations and railway employees and to the public as well.

Hitherto the Government has not undertaken to adjudge the disputes which have so disturbed the field of transportation and which promise to be still more serious in the future than they have been in the past. All that legislation has done up to this time has been to authorize mediation and conciliation and to present an opportunity for voluntary

arbitration. After the most careful consideration it is the judgment of the committee that the time has come to make another advance in the settlement of disputes likely to end in the suspension or restraint of transportation. This forward step must be clearly understood in order to be justly considered. In a controversy between railway workers and railway managers with respect to wages and working conditions and which could only be settled by agreement between the disputants, the right to strike—that is, a concerted cessation of work—seems inevitable, for it is the only weapon which the workers could effectually employ. A proposal to prohibit an agreement among workers to quit their employment at a given time without substituting some other instrumentality for securing justice would not receive at the hands of Congress a moment's consideration. In making the strike unlawful it is obvious that there must be something given to the workers in exchange for it. The thing substituted for the strike should be more certain in attaining justice and should do what the strike can not do; namely, protect the great masses of the people who are not directly involved in the controversy. The committee has substituted for the strike the justice which will be administered by the tribunals created in the bill for adjudging disputes which may hereafter arise.

From the public standpoint and in the interest of the people generally it has become perfectly clear that in transportation at least both the strike and the lockout must cease. This country has been so developed, its population is so situated, its commerce so crystallized that regularity and continuity in transportation have become absolutely indispensable to the lives and health of the people and the existence

of our industrial and commercial welfare. A general suspension in the movement of traffic for a fortnight would starve or freeze, or both, a very large number of men, women, and children; and if it were continued a month or two months, it would practically destroy half our population. Our business affairs would be so disordered that the loss would be greater than in any conceivable war in which we might engage. It is just as much the function of the Government in these circumstances to see to it that transportation is adequate, continuous, and regular as it is to maintain order, punish crime, and render justice in any other field of human activity. It is clear, therefore, that the Government must settle the controversies between railway managers and railway employees which, if left to be fought out between the parties themselves, will lead to the consequences just described. There is but one way in which this can be done: The Government must undertake to declare, in any such case, what is justice, what is fair and right, between the parties to the dispute, and then there must be no concerted rebellion or conspiracy among those whose rights have been adjudged for the purpose of coercing either of the parties to the dispute into another and different settlement.

The railway unions are especially opposed to these provisions of the bill, and the committee addresses a word directly to them. In the step the committee has taken there is no hostility to unionized labor; no opposition to collective bargaining. Indeed, the unions and collective bargaining are necessary parts of the plan suggested in the bill. The unions can be more effective in securing justice under the proposed arrangement than they ever have been through the

strike, for, after all, even the most zealous of the union leaders must admit that their efforts through the strike, from their own standpoint, have substantially failed. The existing complaints with respect to wages and working conditions must be sufficient evidence to these leaders that they have not been able to attain their objects in the old way. Why not, then, exchange the instrumentality which they are now insisting upon and which can be tolerated no longer in a free country for a better one, namely, the justice of an impartial governmental adjudication? The committee is aware that the union leaders feel that they can not hope for justice from the Government, but in the opinion of the committee this distrust has no foundation, and ought to give way to confidence and hope. If we can not organize tribunals which will do justice to employees, employers, and to the public in a business which so vitally affects the welfare of the Nation, then the Government is a complete failure and free institutions must be abandoned as an unsuccessful experiment. The committee believes that when the heat of the immediate conflict over this legislation has subsided a great majority of the railway workers will hail the substitution of intelligent and impartial tribunals, which will render justice to them, for the right to enter into an agreement or combination to destroy transportation as a deliverance, and as a better way to secure what rightly belongs to them than the methods which they have heretofore employed.

The committee has now reviewed those parts of the bill which propose legislation along lines distinct from those which have been already attempted. There are in the bill many amendments of the act to regulate commerce remedying defects which have been

disclosed in the administration of the present law; but it is believed that these corrections need not be specifically enumerated in this report. When the bill is presented in debate all these matters will be carefully explained.

It is but fair to say that this report has not been considered by the committee. It is the work of the chairman, and he alone must be held responsible for it.

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APPENDIX B.

(Ante, p. 17.)

Statements of Representatives, speaking to the Conference Report in the House before the final vote.

Representative Madden (Illinois), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 9, p. 8833):

Objections are made by many to what is known as section 6 of the bill, who profess to believe that a guaranty of a fixed dividend rate to the railroads is provided. Now, what does section 6 provide? It provides that the Interstate Commerce Commission shall have the right to divide the railroad systems of the United States into groups, and that the property of each group, not the stocks and bonds, shall be valued by the Interstate Commerce Commission; that upon the value fixed by the commission a rate shall be made which will yield for the coming two years not in excess of $5\frac{1}{2}$ per cent; that if more than 6 per cent is earned under the rate fixed on all the value of the property of the railroads within the group, used for transportation purposes, that one-half of the amount earned over 6 per cent shall go into the treasury of the Interstate Commerce Commission and be placed in a fund to be used from time to time for the purchase of equipment for the weak roads of the country and leased to such railroads at a rental charge that will yield the Government not less than 6 per cent on the amount so invested. This does not mean that the railroads are guaranteed the right to earn up to $5\frac{1}{2}$ per cent; what it does mean is that they are restricted in their right to earn more without a division of the earnings with the Government. It does not mean that all the railroads in the group will earn $5\frac{1}{2}$ per cent,

either. It is well understood that out of the 2,000 roads in the United States only about 300 are profitable. Some of these roads make large earnings on the same rates paid to the roads which make losses running within the same zone. The roads which make earnings are probably fortunately situated, in that they run through densely populated manufacturing sections of the country and rich agricultural territory. They are highly organized; their management is scientific; they have the brains, the genius, and the initiative that enables them to make profits where less ably managed roads running through less favorable territory make losses. These prosperous roads have always been permitted to retain all of their earnings. Henceforth they are to be restricted in their right to earn more than 6 per cent without a division with the Government. One-half of the excess earnings over the 6 per cent, as I have said, are to be turned into the fund for the upbuilding of the weak roads out of a system of loans by the Interstate Commerce Commission on proper security and under proper restrictions, thus affording to the communities through which these weak roads run an assurance of transportation facilities equal to those afforded to the people of every other section of the Nation.

Even the $5\frac{1}{2}$ or 6 per cent of which I speak is not permitted to be paid to the road under this provision of the bill if the road does not make it. If the road makes but 1 per cent that is all it will get. If it makes 2 per cent it will get that, but the road that does not make has a certainty that out of the earnings of the prosperous roads which are taken by the Government it will have an opportunity to lease equipment furnished through the Interstate Commerce Commission and to make loans to enable it to build up its property, and thereby assist the community through which it runs in the movement of its commodities on equal terms with territory where more prosperous conditions obtain.

Representative Dewalt (Pennsylvania), February 21, 1920, said (Cong. Rec., vol. 59, pt. 4, pp. 3277, 3278, 3279):

Now, let us get down to the essence of this thing. I have prepared here in my humble way an argument as to the constitutionality of this clause in reference to rate making. I have some preliminary remarks here which I desire to have placed in the Record, but rather than take up the time of the committee—and only 15 minutes have been assigned to me—I proposed to get right down to the question that has been propounded by the gentleman from Kentucky (Mr. Barkley), to wit: Is this provision of rate making and this division of the excess earnings of these various companies constitutional or not? I have just as much reverence for the Constitution as the gentleman claims and no doubt has. I do not know a man upon the floor of this House who does not join in that sentiment. But there are various constructions of what may be or may not be constitutional. And right here I beg leave to differ with the gentleman in regard to this construction.

Now, let me give you, if I can, very briefly, the reasons for my belief. I have, preliminary to what I am about to say, summarized the provisions of this clause of the bill. I have pointed out, as well as I am able, that this bill endeavors and does actually consider the transportation systems of the country as a whole or in regional districts. I have tried to show that the bill considers that phase of the question, and that phase of the question only, in making up these rates, and determining what shall be a just, fair, and reasonable rate. And there can be no doubt that if anyone reads the bill he must come to the conclusion inevitably that the purpose of the legislators here was to consider the transportation system of the country as a whole or in regions to be designated by the Interstate Commerce Commission. Now, taking that as a premise, what follows?

During the consideration of railroads, and so forth, under Government control one should be able to free his mind from all prejudice, local sentiment, or personal interest, and at the same time try to legislate for the greatest good to the greatest number, regardless of classes or persons or interests directly and selfishly affected. This may be difficult, as all are naturally subject to the influences of environment and personal welfare, but the duty is imperative when one honestly desires to obtain the best results. The mere statement of some facts will demonstrate the above assertion. This legislation affects the welfare of all the people of this country, in number over 100,000,000. The mileage of the railroads in the year 1918 was 257,618 miles, and of this mileage 240,179 miles were taken over by the Government. The stockholders owning this mileage number 670,000; the bondholders of the various railroads over 300,000. In 1913, \$1,200,000,000 of railway stocks and bonds were held by savings banks and trust companies, and it is now estimated that savings banks, with over 4,000,000 shareholders, held \$1,500,000,000 in railway securities in 1918. In addition to this, it is estimated that the National and State banks hold at least \$500,000,000 of railway securities and that the life insurance companies have of their assets above 30 per cent invested in such securities. Over 2,000,000 men are employed in railroad service, with a total pay roll of over \$2,500,000,000 per annum, and the amount invested in 250,473 miles of line in 1918, with deductions properly made, was nearly \$18,000,000,000.

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I, however, shall refer to section 422, page 88, of the present bill, which contains the rule of rate making, and the discussion of which is found on pages 67 and 68 of the conference report. In brief, this section directs the commission to make rates adequate to provide the carrier as a whole—either in the entire country, or in rate groups or territory

to be established by the commission—with an aggregate annual net railway operating income equal, as nearly as may be, to a fair return on the aggregate value of the railway property held for and to be used in the service of transportation. The designation of the rate districts is left to the discretion of the Interstate Commerce Commission, and the same commission is authorized to determine the value of railway property, and is specifically directed not to give undue consideration to the property investment account of the railroads. The Commission is also authorized from time to time to determine and publish what percentage constitutes a fair return on the value of railway property, except for the two years beginning March 1, 1920. The bill declares in this section that $5\frac{1}{2}$ per cent of the aggregate value of the railway property, as above ascertained, shall constitute a fair return, unless the commission in its discretion adds thereto, in whole or in part, one-half of 1 per cent of such value, to make provision for improvements and betterments, chargeable to capital account. The result of these provisions is that $5\frac{1}{2}$ per cent is fixed as a minimum and 6 per cent as a maximum during the next two years, and thereafter the matter is left to the discretion of the commission.

The bill further provides, in this regard, that if any carrier earns in any year a net railway operating income in excess of 6 per cent of the value of its railway property, as above ascertained, one-half of such excess must be placed in a reserve fund until such fund equals 5 per cent of the value of the carrier's property, and thereafter may be used for any lawful purpose by the carrier. The other one-half of such excess income must be paid into a general railroad contingent fund to be administered by the Interstate Commerce Commission, and this contingent fund is to be used to make loans to carriers, to meet expenditures for capital account, or to purchase equipment to be leased to the carriers. The making of such loans and the obtaining

and leasing of such equipment are left to the discretion of the Interstate Commerce Commission.

The above analysis and statement briefly sums the gist of this portion of the bill. It will be noted the rate-making power still remains with the Interstate Commerce Commission, and it should also be noted that the commission shall not only initiate but that it has the right to modify or adjust rates, so that carriers—or as a whole in each of such rate groups or territories as the commission may from time to time designate—will under honest, efficient, and economical management and reasonable expenditures for structures and equipment earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. Let me call your attention to the phrase, "A fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation."

The commission is also charged with the duty of considering, in the making of rates, the transportation needs of the country and the necessity of enlarging such transportation facilities, and it is impressed with the duty of making rates uniform for all in the rate group or territory which may be designated by the commission, and further, that in consideration of this question of rates due consideration shall be given to all the elements of value recognized by the law of the land for rate-making purposes, but shall give to the property investment account of the carrier only that consideration which under such law it is entitled to in establishing value for rate-making purposes.

From the reserve fund above mentioned the carrier may draw a sum sufficient to pay dividends or interest on its bonds or other securities or rent for leased roads, except only, however, to the extent that its net railway operating income for any year is less than a sum equal to 6 per cent of the value of the railway property held for and used by it in the service of transportation, determined as hereinbefore referred to, and

this reserve fund shall not be drawn upon for any other purpose.

The purposes of the contingent fund have already been mentioned, but are more specifically set forth on page 94 of the bill under subdivision 10 of section 211. In brief, this contingent fund shall be used by the commission in the furtherance of public interests in railway transportation, either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account or by purchasing transportation equipment and facilities and leasing same to carriers—all such loans to be adequately secured—and if there is a balance remaining in the contingent fund it shall be invested in obligations of the United States or deposited in authorized depositories of the United States from time to time.

Care has been taken in this summary to present the salient features of this portion of the rate-making provision, because argument no doubt will be made that the creation of such a contingent fund and such a reserve fund and payment to the Government of the earnings in excess of 6 per cent and dividing the same in the way designated by the provisions of the bill is unconstitutional, in that when a carrier under the rules and regulations prescribed, declaring how a rate shall be made and how it shall be earned, earns more than the designated per cent that the earning carrier is legally entitled thereto. In other words, that when a rate has been declared a reasonable rate, and that rate which has been ascertained by certain rules is also declared to be just and reasonable, no portion of the earnings obtained by such rate can afterwards be declared as unfair and unreasonable, and that the taking away by the Government, except by taxation or similar process, is unlawful and unconstitutional. I am frank to say that when I first met this problem my old-fashioned idea of the rights of property and the sanctity thereof inclined me to the belief that this position was well taken,

but approaching the matter with an open mind and a sincere desire to do what is best under all circumstances and having due regard to the legal phases of the question I am now of the opinion that this form of rate making and this division of excess earning above specified, 6 per cent, in the way provided in this bill is warranted by law. I desire, without unduly lengthening this argument, to give my reasons for that belief.

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I take it, therefore, that the Congress has the right to fix the definite per cent under its regulatory power given by the commerce clause of the Constitution. I affirm also that such definite rate may be a certain amount, to wit, 6 per cent; and now what shall be done with the surplus earnings of any one road, providing that this road is in a group in a rate region or territory? This bill considers the transportation system of the country as a whole. It also considers it in regional territories and declares that in such territories the rate system shall be uniform.

The rights of the public are to have efficient transportation not only over one road but, if possible, over all roads in the country. The rights of the public are paramount and superior to the rights of any one unit in the transportation system. Under the rate-making power and under any rule that may be established it would be impossible to make all rates for all roads, considered as units, exactly just, fair, and reasonable. In the very nature of things some would be excessive and others to the contrary. It therefore follows that in order to serve the public by a general transportation system—considered as a whole, or, if you please, considered in regions—there must be some plan devised by which equalization can be obtained as nearly as possible, so that all parts of the system, as a whole or as a region, may be efficiently and economically administered, and a fair and a just return upon property investment honestly made.

If this bill did not consider, and in its very terms provide for, the use of this reserve fund and this contingent fund, obtained by the excess, in the way that it does, there might be some question as to the constitutionality of this provision; but the bill provides that a fair return shall be ascertained, and in making such determination the transportation needs of the country shall be taken into consideration, and that inasmuch as it is impossible, "without regulation and control in the interests of the commerce of the United States, considered as a whole," to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic, and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to the United States; and then the bill provides that the United States, when receiving this fund from the trustee, again becomes a trustee, and it shall expend this excess, which is then a contingent fund, for the furtherance of the public interests in railway transportation, either by making loans to carriers to meet expenditures for capital account, or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers as hereinafter prescribed, and that moneys in the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositories of the United States. What, then, becomes of this surplus fund above the 6 per cent? A portion of it is used to create a reserve fund for the benefit of the company, which portion shall not exceed 5 per cent of the honest investment of the company, in property held for and used in the service of transport-

tation, and the other half of the excess income is to be paid into this general railroad contingent fund to be administered by the commission, not for the benefit of any one particular road nor for the benefit of a few particular roads, but for the benefit of the transportation system considered in regional districts as a whole where rate-making power has been enforced.

With all due deference, then, to the opinion of others, I maintain that this provision in the bill is not only constitutional, but that it is for the furtherance and conservation of the transportation facilities of the country.

Representative Coady (Maryland), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3300):

I could not present the case for a return of $5\frac{1}{2}$ or 6 per cent better than to quote from an interview given by Mr. Commissioner Clark of the Interstate Commerce Commission, and printed in the Baltimore Sun of January 28 last. Mr. Clark is the oldest member of the commission in point of service and an authority of the highest standing.

He said, among other things:

"It is a matter of common knowledge that the operating expenses of the railroads of the country have increased in much larger proportion than their revenues. The first heavy increase in the wages of the railroad employees was made retroactive for six months or for one-half of the first year of Federal control; whereas the increase in rates was applicable only to the last six months of that year. Putting aside the question of the relationship between the wages and revenues for that year, and considering merely the calendar year just closed, the figures show that the operating ratio has been over 85 per cent. That means that out of every dollar received in revenues 85 cents has been paid out in operating costs, leaving 15 cents to cover taxes, interest on funded debt, and return on other investments. No railroad could operate successfully under such a ratio.

"CAN NOT HAVE TWO RATES.

"Now that the question comes as to whether we shall have by legislative direction a standard or recognized, reasonable level of rates. That proposition is contained in section 6 of the Senate bill. Our experiences of the past show that for an accumulation of many reasons, including advantageous location, wise administration, and popular management, some of the roads are very prosperous, and others are not, under the same level of rates. The unprosperous roads are important to the communities they serve and could not be abandoned without irreparable injury to many industries in these communities. They can not charge higher rates than the prosperous roads under competition, as that would be the surest way for them not to get business. The great mass of tonnage moves along the line of least resistance in the way of freight rates. Therefore, if increased rates are to be given to the unprosperous roads that need them, they must also be given to the prosperous roads which do not need them.

"The only way that the unprosperous roads can be afforded real relief is by fixing a limit on the amount which the more prosperous roads may retain out of their earnings under the established rates. Some say that this is unconstitutional. But I do not see any great difference in principle between that proposal and the policy we have been pursuing in other directions. For example, we have been collecting excess-profit taxes on the one hand and lending money in farm loans on the other, or we have been collecting income taxes graded in percentages according to the size of the individual income.

"Moreover, the plan proposed is just what would result if a single corporation or the Government owned all the railroads. The aggregate revenues in that case would be spread over all the properties, although some of them would earn more than the average and some less.

"5½ PER CENT NOT EXTRAVAGANT.

"A return of 5½ or 6 per cent is certainly not an extravagant one. Figures which we have compiled and presented show that the return from rates in past years of class 1 railroads, which are the railroads having gross revenues in excess of \$1,000,000 annually, have reached a trifle over 5 per cent on the book cost of the roads and equipment.

"In the meantime the railroads of the country must continue to run under Government regulation. The fact that a plan presents some difficulties is no sound reason to condemn it if the principles underlying it are right."

My information is that even this rate will be totally insufficient to enable the roads to pay dividends to their stockholders, and the best that can be done with it will be the payment of the interest on their bonded indebtedness. But it will insure the operation of the roads under private ownership and control, and I believe this will prove to be the best thing for the shippers, the employees, and the public generally.

Representative Crisp (Georgia), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3295):

But it is said this conference report guarantees a fixed return of 6 per cent on the money invested in railroads for the period of two years. I again assert there is no such guaranty. The contention is made that the rate section of the bill gives such a guaranty. I quote the provision:

"SEC. 422. * * * (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a

fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to $5\frac{1}{2}$ per cent of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of 1 per cent of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account."

Under this provision the Interstate Commerce Commission is directed to group the various railroads of the United States into different zones. The commission is then to ascertain the actual value of the railroad properties in each zone, after eliminating all watered stock, and when the actual value of the property is ascertained the commission is to fix passenger and freight rates for each respective zone that will, with honest, economical, and efficient management, yield in revenue to the roads of the zone $5\frac{1}{2}$ per cent. The Treasury of the United States guarantees nothing under this provision nor is there any guaranty to any particular road that it will

receive any fixed income. Under this proviso if a road makes $5\frac{1}{2}$ per cent it keeps it; if it makes only 2 per cent that is all it gets.

Some roads, notably in the South and West, under this provision will barely make enough to keep them out of the hands of receivers, while other roads in industrial centers and in the thickly populated sections of the country will make a much larger income than $5\frac{1}{2}$ per cent. Therefore any rate that will let the railroads operate in the undeveloped sections of the country is too great a rate for those sections where there is great commerce. Hence the conferees in this bill propose to take from all roads half of their profits in excess of 6 per cent and give such excess to the United States to be used as a revolving fund by the Interstate Commerce Commission to be employed to stimulate the transportation system elsewhere throughout the United States.

Representative Sanders (Indiana), February 21, 1920, said (Cong. Rec. Vol. 59, pt. 4, p. 3292):

Having given to the Interstate Commerce Commission the fullest authority to supervise the charges that shall be made and to determine the manner in which capital may be secured, and having granted to the commission the power to fix rates, we have determined as a legislative policy that the roads in any given rate group considered as a whole, which are honestly, efficiently, and economically managed, shall have such rates as will yield a fair return on the property value. For a period of two years this is fixed as nearly as may be at $5\frac{1}{2}$ per cent. This function of the commission does not differ materially from the function already exercised by the commission, except that the bill adopts the $5\frac{1}{2}$ per cent for two years as a matter of legislative policy rather than leaving it to the commission.

The clearest illustration of attempting to meet the railroad problem in a constructive way is found in the provision for a recapture by the Government, to be used for transportation purposes, of one-half the

amount earned by any road above 6 per cent. Where you have two competing roads between two shipping points these roads of necessity must charge the same rate, otherwise the road charging the lesser rate would get all the traffic. Yet a rate fixed for the carriage of freight between those points might yield an unconscionably large return to one road, which by reason of a better route, roadbed, or other similar causes was able to operate at less cost, and yet the yield for the other road might not be large enough to even approach a fair return. This is the problem of the strong and the weak road, and that has been called by many students of the subject the real railroad problem.

I have reluctantly yielded to this doctrine of recaptured earnings. I do not believe in it at all upon principle, but its use in this case affords an apparent solution of the most perplexing question connected with the regulation of transportation.

Representative Black (Texas), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3294):

Mr. Speaker, I next want to discuss briefly that provision of the bill which introduces a definite and plain rule of rate making, and which has been frequently, erroneously, and unfairly referred to as a guaranty of earnings to the railroads. In my opinion, this is one of the best and most constructive provisions of the bill, and one which will do more to solve the difficulties of the railroad situation than any other.

In the first place, it is not in any sense a guaranty of earnings to any railroad. A Government guaranty of $5\frac{1}{2}$ per cent would mean an attempt to assure a given income independently of rates, instead of assuring adequate rates subject to a limit of income. This bill does not assure or guarantee any railroad any specified earnings. It simply directs the Interstate Commerce Commission to grant a rate on the aggregate value of the roads which will, as nearly as may be, yield $5\frac{1}{2}$ per cent to railroads which are

honestly, efficiently, and economically managed. Is there anything unfair or unjust about that? I do not think so, and, in my judgment, anything less than that would not only be unfair and unjust, but would be a shortsighted policy in the caring for the public interest. Capital can not be conscripted to invest in any given industry, and unless it is given a reasonable assurance of protection it simply will not invest, and the particular industry involved must of necessity deteriorate and drift to bankruptcy.

Now, what is the situation as to the railroads? Of the 162 railroads or systems, 109 operate under conditions coming under the head of "less favorably situated." These 109 roads have a total mileage of 120,755, and serve double the area of territory served by the 53 remaining roads. You can not make a railroad rate for each railroad. You can not adjust rates to where they would barely meet the requirements of the 53 large roads without starving the less favorably located roads, but which are just as useful and essential to the territory which they serve as the stronger and more wealthy roads.

Representative Pou (North Carolina), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3301):

The conference report provides for a fair, reasonable, just return to the invested capital. No fair-minded man ought to complain at a return of $5\frac{1}{2}$ or 6 per cent. The American people who support the railroads will not complain, but the railroads may as well understand that promptness and efficiency in freight and passenger service must follow. No fair-minded merchant is going to complain if the railroads are permitted to earn $5\frac{1}{2}$ or 6 per cent from the freight rate he is required to pay if he gets prompt delivery. The price of all commodities has advanced. No one expects freight and passenger rates to remain stationary, but those who travel and those who ship and receive freight have a right to expect more efficient service.

Mr. Speaker, to my mind the alternative is presented—take this report of the conferees or make ready for Government ownership. For my part I say, good Lord, deliver this Nation from Government ownership. Almost anything is preferable to Government ownership and Government operation of the railroads. Of course, it is the duty of every Member of this House to vote as if the result depended on that vote. Politics has no place in the consideration of such legislation. I am convinced if the railroads are returned to private ownership on the 1st of March without any legislation, as has been suggested, the most appalling financial disaster of recent years will follow. Almost all agree that some legislation is necessary to prevent a breakdown of the transportation system of the Nation.

To my mind the alternative is presented—take this report or take something infinitely worse. For these and other reasons I shall vote to adopt the report.

Something has been said about Wall Street dictating this report. I have served for 19 years with the gentleman from Wisconsin (Mr. Esch). When the new moon turns to green cheese, and not until then, will it be within the power of any man to dictate a report that John Esch writes as a conferee of this body.

Representative Kinkaid (Nebraska), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 9, p. 8886):

The report has gone abroad that the bill contains a guaranty of a profit or dividend of 5½ per cent to the railways, but the able chairmen of the House and Senate committees have both explained that this clause does not guarantee any certain profit or dividend to the roads, and in substance that it constitutes a limit upon the earning power, the amount which shall be made and retained by the railroads; that not more than 6 per cent profit or dividend can be realized without yielding one-half of the excess thereof to the Government, to be devoted as a re-

volving fund to the improvement of railways in general.

But, viewed in a general way, the prosperity of the railroads is necessary to their continued and efficient operation. Adequate accommodations can not and will not be afforded unless a reasonable income shall be realized, and thus there are involved the interests of every shipper and every passenger and the interests of everyone in any way concerned, directly or indirectly. It is very plain, too, that the roads must produce reasonable financial returns or adequate wages and salaries can not be paid the employees. It logically follows that every industry and all of the people have a community of interest in the efficient and successful operation of the railways, and this means that they must be reasonably prosperous that the end may be realized; hence the necessity and justification for granting the financial aid provided by the bill.

Representative Cooper (Ohio), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3308):

There has been much unfair and misleading criticism of the financial provisions of the conference report. The bill says that there shall be a return of 5½ per cent on the actual property valuation of the railroads, which is to be determined by the Interstate Commerce Commission. Watered stocks are not validated, and in fact under the bill it will be possible for the Interstate Commerce Commission to squeeze false values out of railroad securities. Those who are so free to talk about big business interests benefiting by Government financial aid to the railroads should remember that there are 670,000 individual holders of railroad stocks and 300,000 owners of railroad bonds, and that a very large percentage of railroad securities are owned by insurance companies and savings banks. Hundreds of thousands of people who have life-insurance policies or are depositors in savings banks are directly interested in the value of railroad securities, and it has been stated that if the

railroads go back to their owners without financial cooperation by the Government very many of them will go into bankruptcy. The interests of insurance policyholders and savings depositors must be protected.

Representative Echols (West Virginia), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 9, p. 8844):

There has been much said about the so-called guaranty clause found in the bill. I fail to find anywhere in this bill where the Government guarantees to any railroad either $5\frac{1}{2}$ or 6 or any other per cent upon the value of its stock or the true value of its property. There is no such guaranty. There is a contingent fund provided that is made up of the excess of 6 per cent earned by the strong roads of the country that is to be placed in the hands of the Interstate Commerce Commission as a trustee, which may be loaned to the weaker roads for equipment, and so forth. There is no tax levied upon the people to create this fund. I would vote for the bill if I lived on the line of the most prosperous railroad in the country.

Representative Sims (Tennessee) February 21, 1923, said (Cong. Rec. Vol. 59, Pt. 4, p. 3290):

How is it conceivable that the weak roads can be strengthened by depriving the strong roads of a part of their net earnings for the benefit of weak roads without having the direct effect of weakening the strong roads to the extent of their net earnings so taken?

It is not thinkable that the weak roads can be strengthened by the aid that they receive from the net earnings of the strong roads without weakening the strong roads in a like ratio by the loss of net earnings. The result will be that the combined strength of all the roads will be no greater by reason of the operations of the contingent fund than the combined strength of all the roads was prior to establishing such sinking fund. As the value of railroad property depends entirely upon net earn-

ings, the reduction of net earnings must necessarily reduce the value of the property of the railroad whose net earnings have been taken and to the extent the value is so reduced the railroad's property has been taken by the Government without just compensation, which is unconstitutional. I do not see how the President can fail to veto this bill on account of this unconstitutional excess-earnings contingent-fund provision. But regardless of any constitutional difficulty, I am unalterably opposed to providing for any definite, specific, statutory net return on the value of railroads, whether valued as single railroads or in systems or by groups, and I am firmly opposed to the recapture of any portion of the net earnings of any railroad in excess of such fixed statutory return. Such proposed recapture provisions in this bill will certainly tend to reduce and stifle individual incentive and enterprise and will result in discouraging the building up and improving of existing railroad properties and will put a stop to the construction of additional new lines, so badly needed in some sections of the country.

This bill provides that the Interstate Commerce Commission on its own initiative may establish both minimum and maximum rates, fares, and charges. This is a new departure in our interstate-commerce law. Heretofore the commission has only had power to determine a reasonable maximum rate. Just what effect the exercise of this new power will have upon rail rates as a whole remains to be seen. But it certainly empowers the commission to eliminate all competition as to rates. But, strange to say, this bill also authorizes the commission to divide the whole continental United States into competing systems. How are we to have competing systems of railroads if common minimum rates are to be established for all these systems? No road can reduce its rates to meet the demands of its shippers below the established irreducible minimum.

By the mandatory provisions of this bill the commission must establish a level of rates that will produce a net income of not less than $5\frac{1}{2}$ per cent on the value of all the railroad property in the United States taken as a whole or in groups less than the United States as a whole. Therefore, the minimum level of rates can not and must not be less than will be necessary to produce the $5\frac{1}{2}$ per cent net return on all the railroad property in the rate-making areas. The imperial State of Texas can not put into effect an intrastate rate that would be valid if the rate, in the opinion of the commission, would result in giving rates within Texas that would be less than the established minimum level, or that might, in the judgment of the commission, tend to reduce the minimum net return below $5\frac{1}{2}$ per cent on the railroad property as a whole in the rate-making district in which Texas is a part.

Representative Kitchin (North Carolina), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3311):

Mr. Speaker, I have listened carefully to all the speeches made to-day by the advocates of this report. It was strikingly noticeable, first, that no one declared that this report, if adopted, would be helpful to the people or a benefit to the producers and consumers. Not one asked the House to vote for it on the ground that it was in the public interest. All asked for its adoption on the ground that it would help the railroads—that it would benefit the stockholders and bondholders of the railroads. Some asserted it would not hurt labor. None declared it would not hurt the public. They seemed unmindful of the fact that the only way this report would help the railroads was by hurting the people; that in thus favoring helping the railroads they favored putting an increase of the burdens on the Government and the taxpayers and on the shippers and producers and consumers of the country. The only possible way this bill can help the railroads is at the expense of the Government, the taxpayers, and the people.

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There never was a time in the history of the railroads that every railroad in the United States made money; that every investor in railroad stocks and bonds realized a profit. At all times some railroads did not make money; some investors in stocks and bonds suffered losses. Heretofore investors in railroads and their securities, like investors in every other kind of business, took the chance of gain or loss. There never was a time when some railroads were not in the hands of a receiver. But with the adoption of this report, hereafter the Government, for the first time—and I believe the first Government on earth to do it—practically guarantees—that is, compels the Interstate Commerce Commission to insure the making of money, more or less, by every railroad in the United States and the realizing of profits by every investor in railroad stocks and bonds.

It is said by the advocates of this bill or report, by the congressional authors of the bill, that there is no such guarantee. True, there is no such guarantee directly out of the Treasury and pockets of the taxpayers, but there is a practical guarantee that it shall come out of the pockets of more than a hundred million people—out of the pockets of the consumers in the United States. This bill, this report, expressly directs the Interstate Commerce Commission to so adjust or increase the rates throughout the United States, or in groups or regions, if in the discretion of the Interstate Commerce Commission it shall so divide the United States, so that it will insure at least an average return of profit of $5\frac{1}{2}$ per cent—and the commission can increase it to 6 per cent, and after two years can increase it to over 6 per cent—upon the aggregate value of the railroads in the United States, or in such groups or regions as the Interstate Commerce Commission may fix.

The supposed or nominal authors of this provision and its advocates vigorously deny that there is any such practical guarantee or assurance. The nominal authors of the bill should not be criticized for this

denial, because since they did not conceive and prepare this provision of the report, the same being conceived and prepared by a prominent railroad president, it is quite natural that they would not understand its meaning and effect quite as well as if they themselves were the real authors of it.

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And after two years the commission may fix the percentage of return—that is, declare what the minimum fair return will be, but under the necessary implications of this report the commission will never put it at less than $5\frac{1}{2}$ or 6 per cent, and it may be much more. *No man with sense can read that provision without knowing that it is a practical guaranty that every railroad shall make money and every investor in stocks and bonds shall realize a profit.* The only difference between this and an actual guaranty direct by the Government is that by the actual guaranty the profits or money guaranteed would come out of the Treasury and taxpayers, while under this provision the guaranty or assurance comes out of the pockets of the shippers and producers of the country, but finally out of the consumers. These provisions are mandatory on the commission.

I wish now to direct your attention to another plain proposition contained in section 422. You will observe that the rates of the roads throughout the United States, or in the groups or regions which the commission may fix, must be uniform; that is, when the rates on one road are increased, the same increases shall be had on all other roads in the group, whether such roads require such increased rates or not. In other words, it means that in order to increase the rates on a road that is not making sufficient money or sufficient profits for its investors, the rates upon a road which is making sufficient profits under existing rates shall also be increased. It makes the farmers, merchants, and manufacturers, and other producers living along the line of the road that requires no increase in rates, one making sufficient

money or profits under existing rates, pay increased freight and passenger rates in order to help some other road that is not making sufficient profits to make more money. Why should the farmers, merchants, and manufacturers living in my district be forced to pay increased rates when the existing rates are sufficiently high to enable the railroads there to make reasonable profits in order that some road, perhaps 500 or 1,000 miles away, on which they never traveled a mile or shipped a pound or bushel of freight, may increase its rates to its farmers, merchants, and manufacturers to satisfy the avarice of its investors? Such a proposition from every viewpoint is simply monstrous. It violates every fundamental principle of justice and fair dealing.

Let me direct your attention to another unjust, unfair, and, in my opinion, unconstitutional provision in this section 422. It provides that when a road, whether its rates are increased or not, makes a net return of over 6 per cent, that one-half of the excess shall go into a Government fund, controlled by the commission, for the purpose of loaning it to other roads or with which to buy equipment to rent to other roads. In other words, it takes the profits from one road that is well circumstanced, honestly, wisely, and efficiently managed, and gives it by way of loans and rentals to another road, perhaps a competing road, not so economically and efficiently managed. It thus puts a penalty upon honesty and efficiency and a reward upon inefficiency. This strikes me as being against every element of right and justice. It has the fundamental elements of socialism and communism. It deliberately takes by law the property of one who succeeds and bestows it upon another who fails to succeed. As indicated a moment ago, in my judgment this provision is unconstitutional.

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I feel it my duty before concluding to congratulate the authors of the report in that it contains no deception, no evasions, no obscurities, no jokers. There is no attempt to mislead, no intention to deceive. Its

terms and provisions are unmistakably plain. No one who reads it can possibly be misled or can possibly misunderstand. Its meaning is audaciously clear. The boldness in making clear by its terms and provisions the real purpose of its authors that this is a report, a bill, to protect the railroads and to promote the interests of their stockholders and bondholders for all time at the expense of the people is both commendable and attractive. Its purpose and effect is not only to increase to the holders the value of their securities but to insure that holders and investors in railroad securities shall have at all times and at all hazards safe margins of profits, although every other business and every other investor may, in the paralysis of hard times and falling prices, be sustaining a loss. The present holders of railroad stocks and bonds will by this bill, if its design is accomplished, have their securities increased at least \$2,000,000,000. Such favoritism to the special interests is unwarranted by any condition or fact. It is vicious and intolerable.

Mr. Speaker, the owners have been clamoring for the return of the roads since the armistice, and now when the Government is ready to return to them the roads, to receive them they charge the Government in gifts, loans, guaranties, and extensions of credits nearly \$2,000,000,000, and in addition they demand the surrender by the States of all control over the intrastate commerce, and in further addition they demand their exemption from the antitrust laws.

The stockholders and bondholders of the railroads dictated and the conferees wrote into the report the terms and conditions upon which they would receive their own property, under the threat that if their demands were not granted they would bring chaos upon the country. One of the essential provisions which, as many advocates declared, causes them to support this report was conceived, prepared, and written by a prominent railroad president, chairman of the association of holders of railroad securities, and forced by him and other railroad officials into the report. The distinguished chairman (Mr. Esch) dis-

closed this fact in his speech on November 19, presenting the Esch bill. He was then making an argument against the same provision, which was then in the Cummins bill—a stronger argument against it than to-day he has made for it. What railroad president or official or what stockholder or bondholder wrote the other provisions of the bill I do not know. The distinguished chairman has not told us, but I do say that this is a railroad bill, for and by the railroads, for and by the stockholders and bondholders. Advocates of the bill have shown by their speeches that this is a fact; that in this bill the Government, the people, the shippers, the producers, and consumers have not had a look in, nor have they had a chance even before the people's representatives to have their interests protected.

Representative Barkley (Kentucky), February 21, 1920, said (Cong. Rec. vol. 59, pt. 4, pp. 3272, 3273, 3275):

The Government, however, has done much more than merely made good this loss. It has advanced to the roads out of the Treasury practically a billion and a quarter of dollars. Congress has already appropriated \$1,250,000,000 and the pending bill carries an additional appropriation of \$200,000,000, and the railroad Administration informs us, through the director of finance, Mr. Sherley, that \$436,000,000 more will be necessary as soon as the roads are returned to their owners, making a total of \$1,886,000,000 taken out of the Treasury of the United States for the benefit of the railroads. The human mind refuses to grasp these enormous figures, but we may catch a faint conception of what they mean when we understand that this sum represents nearly one-third of all the taxes paid into the Federal Treasury by the American people during the year just closed. Whether still other appropriations will be required need not now be discussed, but we may be prepared to expect that they will be requested if the amounts already provided for are not sufficient.

When this railroad bill was originally introduced into the Senate by the distinguished Senator from Iowa (Mr. Cummins) it did not contain the provision which has since become generally known as "section 6," but is now section 422 of the pending bill, which in the bill as it passed the Senate provided that the commission should so adjust and fix the rates to be charged by the railroad as to produce a return of 6 per cent net upon the value of the property of all the railroads in the United States, the value to be ascertained and fixed by the commission. However, when the railroad bill was finally reported to the Senate from the Senate Committee on Interstate Commerce it contained this section 6, and it was included in the measure as it passed the Senate in December; and this section, and the guaranty provisions which it contained, constituted one of the great stumbling blocks over which the House and Senate conferees labored for many weeks.

During the long hearings held by the House committee on this legislation, covering a period of more than two months and a half, when the proponents of this guaranteed return appeared and urged its inclusion in the House bill, it received scant consideration, in spite of the able counsel who were employed to urge it upon the committee. I am sure my distinguished friend from Wisconsin, the chairman of the committee (Mr. Esch), will not contradict that statement. It was given so little serious consideration that it was not proposed by anyone in the committee, and it is doubtful whether it would have received a vote if it had been proposed.

But there has been in existence during all the consideration of this legislation an organization whose sole object has been to foist this proposal upon the American people. While the people of the Nation have been bending their energies to solve the great problems which have come to the surface as a result of the World War, while they have their minds on other things, this organization has camped on the

doorsteps of Congress, engaging in and directing the most powerful propaganda ever undertaken in behalf of private interests, and as a result of their activities we find in this measure what I consider the most vicious and insidious departure from established principles of equality and justice ever sanctioned by a legislative body. This poverty-stricken organization has maintained in the National Capital for more than a year luxuriously appointed quarters, with high-salaried agents constantly on hand to urge that legislative safeguards be afforded to them which no other class of industry or investment has ever received or requested.

In order that we may understand just what this provision does for the railroads and to the people, let me state it in a few sentences. It directs the commission to "initiate, modify, establish, or adjust" rates so that carriers as a whole will earn an aggregate annual net income equal to a "fair" return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation; and then follows a provision which declares that for the next two years this "fair" return shall be fixed at $5\frac{1}{2}$ per cent plus an additional one-half of 1 per cent for betterments and improvements, which makes a total of 6 per cent net that the bill instructs the commission to produce on the aggregate value of all the property of all the railroads in the country. It then provides that if any road shall make more than 6 per cent under the rates fixed by the commission one-half of the excess shall be set apart in the fund to be used by the roads in making improvements and betterments chargeable to capital account, and the other one-half shall be paid to the Interstate Commerce Commission for the creation of a "revolving" fund to be used in making loans to other railroads or in purchasing equipment, such as cars, engines, and other equipment to be leased to them.

Those who have urged this proposition upon Congress have set up the claim that it is necessary to do it because the Interstate Commerce Commission has

not treated the railroads fairly in the past in fixing rates. They claim that this thing must be done in order that capital may be induced to invest in railroad securities, in order that new capital may be brought into the railroad industry, in order that there may be larger extensions of railroad lines and railroad facilities in the United States. In other words, they tell us that in order that credit may be restored to the railroads of the country it is necessary for Congress by legislative enactment to put stilts under them and inject into their stocks values to which they are not entitled under normal conditions.

Let us examine the administration of the law which has existed for more than a quarter of a century. Let us look briefly into the history of railroading, the history of dividends, the history of the growth of American railroads in order to determine whether this indictment against the Interstate Commerce Commission is just or well founded. And in that connection I hope the Members of this House will not forget that the enactment of this measure in its present form is a legislative confirmation of all the charges and assertions which have been made against the commission by certain railroads which have for years been clamoring against it. It is a legislative indictment of the policy of the commission which has been upheld by the Supreme Court in scores of cases which they have decided. It is a legislative approval of all the anathemas which have been hurled at the commission by the railroad security holders who have demanded that, whatever else may happen, their dividends must be vouchsafed and guaranteed to them.

I maintain that this unprecedented, un-American, and unwholesome departure from the true functions of legislation is unnecessary, and in support of that assertion I summon the statements and records of the railroads themselves on file under oath before the Interstate Commerce Commission.

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I can not, Mr. Speaker, support a measure which compels the people of the Nation to pay tribute to inefficiency and extravagance, in order that railroads that do not deserve 6 per cent or any other fixed or established per cent shall receive that return, and in order that the ordinary hazards of business and investment shall disappear through the magic touch of legislation. I can not support a measure which insures one class against failure by levying tribute upon others not similarly protected.

But in order to give this proposal a semblance of propriety, it is provided that if any railroad in the United States shall make more than 6 per cent, upon rates which have been declared to be legal, just, and reasonable, one-half of that excess shall be taken from it and used to create a fund to be loaned to other roads, or used to purchase equipment to be leased to them. In other words, after the commission has fixed rates that under the law are presumed to be just and reasonable, if any railroad, by honesty, efficiency, economy, and good management, should make more than 6 per cent, it is to be penalized by taking from it one-half of the excess above 6 per cent for the benefit of other roads which may not have been so efficiently, economically, or honestly managed, or which in the nature of things could not keep pace with their competitors.

I can not rid myself of the deep conviction that this is an unprecedented, if not vicious, departure from the legislative history of this Nation, for never before have we gone so far as to penalize economy and efficiency in order that the opposite qualities might receive more than their share of the rewards of honest effort. And if this policy shall be adopted with respect to the railroads, is there any reason in logic why it ought not to be adopted or why it may not be demanded with respect to other business in the United States?

The Constitution confers upon Congress the power to regulate commerce among the several States and with foreign countries. Under the decisions of the

Supreme Court and the practices of the commission and other bodies from time to time established by Congress, this power has developed into the regulation not only of commerce itself but also of the instrumentalities of commerce, which includes the railroads. Therefore, if it is wise and proper, if it is in accordance with the theories and principles of our Government, that Congress shall not merely regulate commerce but shall regulate the earnings of commerce, why shall we not be compelled to follow this policy in logical sequence in the future and regulate the earnings of individuals and corporations which ship commerce over the railroads or produce things that enter into commerce? If we are to embark upon the policy of taking away from prosperous and successful railroads in order to give to unsuccessful or poorly managed railroads, why is it not just as righteous and as fair to take away from prosperous corporations or individuals a part of their earnings in order that it may be given to the improvident and the shiftless?

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Let us see how this legislation will operate to do violence to that solemn constitutional safeguard to the rights of property. In order that this average of 6 per cent net may be guaranteed to all the railroads it will be admittedly necessary for those who live along or patronize well-managed, successful, and honest roads to pay more than the service they receive is worth, more than the roads themselves may ask for or need, in order that a fund may be created which is to be used for the benefit of others. Therefore, if these well-managed and successful roads, under lawful rates which must in theory at least be "just and reasonable," are able by the exercise of economy and prudent business management to earn more than 6 per cent net, under the law and under the guaranties provided in the Constitution it belongs to them. If the rate is lawful, if it is approved by the commission as just and reasonable, they are entitled to earn all they can under that

rate, and they are entitled to keep it as their reward for efficiency and economy.

We have no constitutional right to take away from them what they have saved honestly through efficient management in order to bolster up the credit of weak, mismanaged, or inefficient railroads. And if, upon the theory that a particular road is earning more than it is entitled to, we have a right to take away a part of its earnings, certainly we have no right, in the first place, to take it away from the people who pay it. For if a railroad earns more than it is entitled to earn or retain it is because it is permitted or compelled to collect from the people an unreasonable rate which results in the excess, and if the people are paying an unreasonable rate to one road in order that some other road somewhere else may be helped, we are taking away from them a part of their property without due process of law and without compensation. This, in my opinion, renders the law doubly unconstitutional. If the rates which the railroads collect are lawful rates, are just and reasonable for the service rendered, the roads are entitled to the earnings they may be able to realize from them. If they collect, even with the permission of the commission or under its compulsion, rates which are more than reasonable, and therefore unreasonable and unlawful, the excess belongs to the people, and they are entitled to retain what is theirs until it is taken away from them in the manner prescribed by the Constitution. And if this provision for taking a part of the excess shall be declared unconstitutional, and many roads are allowed or compelled to collect rates higher than they are entitled to, the result will be the taking from the people of hundreds of millions of dollars in excessive freight rates without even receiving an indirect benefit from the excess payment. There would in that event be no provision for the recapture of any of the excess or for its return to those who had paid it.

Now, let us see about the question of the valuation of the railroads upon which this 6 per cent net return

is to be based. In 1913, seven years ago, Congress passed an act providing for the physical valuation of the railroads of the country. Up to the present time only five or six of them have been valued, and those five or six are contesting the valuation placed upon them by the Interstate Commerce Commission. It is admitted by everybody who knows anything about it that the valuation of the railroads of the whole country can not be completed within the next two years. Therefore during that two years we can not know with any degree of accuracy what the total value of the railroads is upon which we proposed to fix this net return of 6 per cent. I received in my mail to-day a letter from Mr. Samuel Rea, president of the Pennsylvania Railroad Co., inclosing a speech which he had made somewhere asserting that the total value of the railroads of the United States amounts to more than \$24,000,000,000. Under the Interstate Commerce Commission's reports their total capital is a little more than \$19,000,000,000 and their total investment a little more than \$18,000,000,000. Others whose opinions are entitled to consideration contend that their real value is much less than either figure given above. Whose estimate is to be taken? Whose figures are to be used as the basis upon which this tribute from the American people is to be required? It may be said that the commission shall fix its own value. But what will be its standard of valuation in the absence of the completed valuation provided for in the valuation act? Will its valuation be what it would require to reproduce the property at present prices? Or would its standard be the price the property would bring at a fair voluntary sale? Or shall the valuation be based upon earning capacity? All these standards may result in different amounts and a combination of the three in still different figures.

The absurdity of fastening upon the country a rate structure which is designed to guarantee 6 per cent net upon a valuation that can only be guessed at is so obvious that it is almost inconceivable that

Congress would seriously consider it. And the absurdity increases when we realize that this standard of return will be a permanent standard, for, notwithstanding the bill provides that after the two years shall expire, after the rate structure has been set and ordained to produce 6 per cent, the commission may establish a different standard of what is a "fair" return, we know it will not be reduced, because the congressional sanction of 6 per cent as a minimum will be powerfully persuasive to operate against any reduction that might be possible. Therefore we are by this legislation compelling the commission to guarantee to the roads 6 per cent upon the value of their property when they themselves do not know what that value is.

Representative Griffin (New York, February 21, 1920) said (Cong. Rec. Vol. 59, Pt. 4, p. 3286):

If this bill becomes a law it will most assuredly accentuate and redouble the demand for Government ownership. The people will soon grow tired of seeing special interests specially favored and taxpayers in general will begin to ask why taxes are collected out of their hard-earned income to be set aside in revolving funds to loan to railroad corporations. Already the farmers are up in arms. The Corn Belt Meat Producers' Association, the Farmers' Grain Dealers' Association of Minnesota, and the Illinois Farmers' Grain Dealers' Association have passed the following ironical but very significant resolutions:

"Resolved, That we ask our representatives in Congress to immediately enact legislation dividing the country into farm zones or districts, and guaranteeing to the farmers, in the aggregate, in each zone or district for a period of two years from the effective date of the legislation a net return of $5\frac{1}{2}$ per cent profit, plus $\frac{1}{2}$ per cent for new fences and barns; and that the said total of 6 per cent shall be above all taxes and above all cost of labor and supplies; and it shall be computed on the present cost of reproduction of the

farms in said zones or districts in their present condition: Further be it

"Resolved, That as an incident to the foregoing guaranty, that Congress shall also be requested to guarantee (1) that we won't have a drought this summer, (2) that our sows will bring forth of their kind bountifully and plentifully, and (3) that our eggs will hatch, our hens will cackle, and our roosters will crow."

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A continuance of Government control can not in any way injure the prosperity of the Nation. On the other hand, the passage of this measure at this particular time will further increase the cost of living, for when you raise freight rates from 25 to 40 per cent you add at least one billion to the charges paid by shippers and several billions in added costs to the public at large. At this period of our country's history our paramount duty is to reduce the cost of living, not to increase it; to allay the existing unrest, not to stimulate it; to zealously guard extravagance, not to throw open the doors of the people's Treasury, guaranteeing the earnings of a select class. If this bill becomes a law, it will be listed, in my estimation, as one of the greatest blunders in the history of the American Congress.

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The proponents of this legislation would have us believe that the farmers are in favor of it, but this letter will refute that statement:

GENTLEMEN OF THE CONGRESS: On behalf of the 750,000 members of the farmers' organizations united in the Farmers' National Council to carry out their reconstruction program, I most earnestly request you to defeat the pending conference railroad bill.

Nearly every national farm organization of any size, regardless of its position on the return of the railroads, has opposed the Government guarantee of dividends or Government subsidy, which is specifically provided in section 15a (3) of this railroad bill,

wherein the Interstate Commerce Commission is instructed to fix rates which will yield $5\frac{1}{2}$ per cent on the aggregate value of the railroads and permitted to add not to exceed one-half of 1 per cent of such aggregate value.

May I repeat that the overwhelming majority of the organized farmers of America, and, in my judgment, of the unorganized farmers, are opposed to the return of the roads under the pending bill, and I express the hope that you will oppose such legislation and work for the two-year extension of Government operation, so that a plan fair to all the interests involved may be worked out for the final disposal of the railroads.

Yours sincerely,

THE FARMERS' NATIONAL COUNCIL.

GEORGE P. HAMPTON,

Managing Director.

FEBRUARY 20, 1920.

Representative Evans (Montana), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 9, p. 8874):

My particular objection and complaint to the bill is that it is in effect a guaranty of $5\frac{1}{2}$ to 6 per cent upon the investment of these properties. In order that we may understand just what this provision does for the railroads and to the people, let me state it in a few sentences. It directs the commission to "initiate, modify, establish, or adjust" rates so that carriers, as a whole, will earn an aggregate annual net income equal to a "fair" return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation, and then follows a provision which declares that for the next two years this "fair" return shall be fixed at $5\frac{1}{2}$ per cent plus an additional one-half of 1 per cent for betterments and improvements, which makes a total of 6 per cent net that the bill instructs the commission to produce on the aggregate value of all the property of all the railroads in the country. It then provides that if any

road shall make more than 6 per cent under the rates fixed by the commission, one-half of the excess shall be set apart in a fund to be used by the roads in making improvements and betterments chargeable to capital account and the other one-half shall be paid to the Interstate Commerce Commission for the creation of a "revolving" fund to be used in making loans to other railroads or in purchasing equipment, such as cars, engines, and other equipment to be leased to them.

If this provision of the bill goes into effect, the Congress puts its stamp of approval on improvidence, negligence, and inefficiency. There will no longer be a reward for energy, initiative, frugality, and efficiency. I can not support a measure which compels the people of the Nation to pay tribute to inefficiency and extravagance in order that those who do not deserve it may get 6 per cent or any other established return. I can not bring myself to believe that any measure that insures one class of our people against failure in business by levying tribute on another class is good legislation.

This bill provides that if any railroad shall make more than 6 per cent on rates which have been declared to be legal, just, and reasonable, one-half of the excess of said 6 per cent shall be taken from it and used to create a fund to be used for the benefit of other roads. In other words, when the Interstate Commerce Commission has fixed a rate that under the law is just and reasonable, and any road through honesty, energy, and economy and efficiency and good management makes more than 6 per cent, it is to be penalized because of its honesty, efficiency, and good management, and one-half of the said excess is to be turned over to those roads whose management is negligent, inefficient, and possibly dishonest, or are for some other reason a financial failure. Such legislation is a departure from all the precedents of the Government.

Representative Denison (Illinois), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3297):

There is no valid reason why a fair return of capital invested in the railroads in the different rate-making districts of the country should be exactly the same or that it should be exactly the same from year to year. Investments of private capital in other industries or other securities do not yield the same returns in different parts of the country or in different years. People invest their capital in railroad securities just as they do in other industries with full knowledge of the conditions of the business, with the chance of loss and the hope of large returns before them. It is a mistake for the Government to single out investments of private capital in railroads from all other industries of the country and by legislation guarantee a fixed return on such investments without regard to any of the conditions which under natural economic laws determine the returns on all other investments. It is not only unwise but it is dangerous legislation. If we guarantee a fixed return on railroad investments for two years we will thereby blaze the trail and set the precedent for similar legislation by those that follow us. We will later be asked to do so for the years to come, and who knows but that we may be asked to do the same for investments of private capital in telephone and telegraph companies and other public utilities, in coal mines, and other industries that are essential to public welfare.

The excuse for a legislative guaranty of income on such other investments may not now be as apparent as for investments in the railroads, but the principle involved is the same. It is paternalism pure and simple. A Congress might be elected that would think 7 per cent a fair return, or public sentiment might change and a Congress be elected that would think 2 per cent a fair return on railroad investments and legislation might be enacted guaranteeing that return. Congress should never attempt by legislation to even up and equalize the incomes arising

from investments of private capital. Some investments in railroads have been wise and some unwise. Some railroads have been managed wisely and some unwisely. Some have been fortunate and others unfortunate because of natural conditions. Some have been honestly managed and some dishonestly managed. It is, I think, an unwise and dangerous policy for the Government to undertake by legislation to level up such investments by guaranteeing a fixed return. It is the first step toward socialism, and I am opposed to taking the first step in that direction.

Representative Ayres (Kansas), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 9, p. 8868):

It has been stated, and so far it has not been denied, that this guaranty feature of section 422 of this bill was conceived and prepared by a prominent railroad president, Mr. Warfield, who is also chairman of an association of holders of railroad securities said to represent 90 per cent of the total amount of securities in the United States. If this is not true, let some one in authority deny it. There is no denying the fact that there has been a wonderful and powerful organization here in Washington directing and managing a propaganda in behalf of the railroad interests, and it has succeeded in getting through the most pernicious and vicious measure that was, to my mind, ever enacted.

I wonder what this Congress would do if the farmers and stockmen of the country would come here and demand we pass a law guaranteeing them against drought or an epidemic; or that we guarantee them a 5½ per cent return on the aggregate value of their properties; or that we divide them into regions and provide all who make a return of over 6 per cent must put one-half the excess in the pot to be loaned to or buy equipment, machinery, and stock for some fellow who never did make a living on his farm, and never would?

Oh, but some will say, "This is pure demagoguery." Well, let us see if it is. We know that when the war came many railroads had practically ceased to function and within 60 days from the time they were taken over would have been in the hands of receivers. Their managers or operators confessed their inability to stem the tide. This condition was brought about in many instances by the exploitation of the roads. But it matters not the cause, at that time when the Nation needed every avenue and means of transportation in its struggle for life and existence, that which should have been its main support was a dismal failure, which was a disgrace to the management of the Nation's greatest enterprise. There was but one horn of the dilemma for the Government to take. It had to act and act at once. It took over the control of this great transportation system. It had to retain for its management those familiar with its working. To have done otherwise meant disaster.

Representative Mason (Illinois), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 9, p. 8856):

Mr. Speaker, after years of legislative experience in both branches of the legislature of my State and both branches of Congress, I have learned to respect the opinions of my associates. I have seen appalling legislative actions taken, sometimes by "whip and spur" through brilliant leadership, sometimes by the artifice of quick action without fair debate, and sometimes by the clever insertion of the legislative joker. There is a large majority of this House and the Senate that will vote for this bill; but I give it as my solemn judgment that if either the Esch or Cummins bill had 30 days ago proposed a change in the law that gives the railroad companies "fair and reasonable rates," which has been the law for more than a quarter of a century, so that the law would read that the companies should be allowed to charge all expense and then be guaranteed $5\frac{1}{2}$ and 6 per cent on the value of the property which they own, there would have been such a protest from our constituents

that not a single man in either Chamber would have voted for that proposition.

Representative Sanders (Louisiana), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3303):

The provision of section 422, constituting, as it does, a governmental guaranty of dividends upon private investment, is economically unwise, politically unheard of heretofore, and un-American in that it violates the principle of special privileges to none.



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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

DAYTON-GOOSE CREEK RAILWAY COM-	} In Equity, No. 330.
pany	
v.	
THE UNITED STATES OF AMERICA, INTER-	
state Commerce Commission, et al.	

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is an appeal from a final decree of the District Court of the United States for the Eastern District of Texas at Beaumont, sustaining a motion to dismiss filed by the United States, appellee, and dismissing the petition. The appellant here was the complainant in the lower court.

Section 422 of the transportation act, 1920, approved February 28, 1920, amended the interstate commerce act by inserting therein a new section, designated section 15a, and pursuant to the authority conferred and the duties imposed upon it by the latter section the Commission issued orders dated,

respectively, January 16 and March 16, 1922, which are in words and figures as follows, namely:

INTERSTATE COMMERCE COMMISSION,
WASHINGTON.

ORDER.

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 16th day of January, A. D. 1922.

In the matter of the recovery and payment of excess railway operating income under the provisions of section 15a of the interstate commerce act.

The Commission having under consideration the provisions of paragraphs (6) and (9) of section 15a of the interstate commerce act, reading as follows:

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof, shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purpose of this paragraph the value of the railway

property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided for in paragraph (4).

(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of the year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

It is ordered:

(1) That the years or parts of years for which net railway operating income and the return represented by such income upon the aggregate value of railway property held for and used in the service of transportation are to be computed shall be the years or parts of

years ending on December 31, respectively. In the case of any carrier which accepted the provisions of section 209 of the transportation act, 1920, the first period for which such computations are to be made shall be September 1, 1920, to December 31, 1920, both inclusive. In the case of carriers which did not accept the provisions of said section 209 of the transportation act, 1920, the first period for which such computations are to be made shall be March 1, 1920, to December 31, 1920, both inclusive.

(2) That the excess income for the portions of a year ended December 31, 1920, shall be preliminarily fixed as the income in excess of such proportions of 6 per cent on the value of the railway property held for and used in the service of transportation as the net railway operating income for the months of September to December, both inclusive, or for the months of March to December, both inclusive, as the case may be, in the three years ended June 30, 1917, bears to the total net railway operating income for the same three years.

(3) The aggregate value of the railway property of the reporting carrier or carriers held for and used in the service of transportation shall be based preliminarily, in the case of carriers which made such returns directly or indirectly, upon the amount reported or used by such carrier or carriers as the aggregate value of railway property held for and used by them in the service of transportation in the proceeding entitled "in the matter of the applications of carriers in official, southern and western classi-

fication territories for authority to increase rates," Docket No. Ex Parte 74, with adjustments for—

(a) New lines, extensions and additions, and betterments;

(b) Retirements;

(c) Amounts of property for which permission to retain earnings under paragraph (18) of section 15a of the interstate commerce act has been granted; and

(d) Other increases or decreases, properly affecting the aggregate value of the railway property of such carriers held for and used in the service of transportation, claimed or reported by the carrier and supported by detailed explanations. The value of such railway property, as reported, will be corrected and the actual value will be determined in the manner provided in paragraph (4) of section 15a of the interstate commerce act, and corresponding adjustment in amounts recoverable by and payable to the Commission will be effected. In the case of those carriers which did not directly or indirectly make returns in connection with Ex Parte 74, the investment in road and equipment as of December 31, 1919, with proper adjustments as herein above indicated will be used for preliminary computations, and these preliminary computations will be similarly corrected after the determination of actual values in accordance with paragraph (4) of section 15a of the interstate commerce act.

(4) The establishment of preliminary bases for prorating the return of 6 per cent, or

ascertaining property values to which the rate is applicable, does not preclude any carrier from using such other bases as it considers more equitable and in accord with the facts; such other bases, however, must be fully and properly supported.

It is further ordered, That pursuant to the foregoing rules and regulations for the determination and recovery of the excess income payable under section 15a of the interstate commerce act each and every carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the provisions of the interstate commerce act, excluding—

(a) Sleeping car companies and express companies;

(b) Street or suburban electric railways unless operated as a part of a general steam railroad system of transportation;

(c) Interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight; and

(d) Any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated and controlled by any State or political subdivision thereof, shall on or before February 1, 1922, report to the secretary of the Interstate Commerce Commission, Washington, D. C., the following matters:

1. The amount by which its net railway operating income for the period ending De-

ember 31, 1920, was in excess of that percentage of the value of railway property held for and used by it in the service of transportation, established by the foregoing rules, with explanation and details of the manner in which such excess income was computed, or, in the event there was no such excess railway operating income, that fact, with corresponding calculations and details in support of the return.

2. In cases where excess net railway operating income is reported, a statement of the title of the fund account in which one-half of such excess was placed, when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held.

3. The amount of the remaining one-half of the excess income as preliminarily computed paid to the Interstate Commerce Commission and when and how such amount was paid. If unpaid the amount should be paid by remittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, secretary of the Interstate Commerce Commission, Washington, D. C.

4. The value of the railway property of the reporting carrier or carriers with a statement in detail of the manner in which such value is arrived at and a full explanation as to the method in which the values of properties of a group of carriers have been aggregated in cases where property values and income are

computed for a system pursuant to the provisions of paragraph (6) of section 15a of the interstate commerce act. In such cases a full explanation should be given of the reasons why the group of carriers used are treated as under common control, management, and operation.

It is further ordered, That an original report and three copies of the same shall be forwarded to George B. McGinty, secretary, Interstate Commerce Commission, Washington, D. C. Reports shall be prepared in typewritten or printed form, on paper approximately $8\frac{1}{2}$ by 11 inches, with $1\frac{1}{2}$ inches margin at the left side for binding, except as to exhibits, which may be of any convenient size, but which shall be folded to conform to the size of the report.

It is further ordered, That the original reports shall be made under oath signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

By the Commission, Division 4:

[SEAL.]

GEORGE B. MCGINTY,

Secretary.

(Rec. 19-22.)

INTERSTATE COMMERCE COMMISSION,
WASHINGTON.

ORDER.

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 16th day of March, A. D. 1922.

In the matter of the recovery and payment of excess railway operating income under the provisions of section 15a of the interstate commerce act for the year ended December 31, 1921.

The Commission having under consideration the provisions of paragraph (6) of section 15a of the interstate commerce act, reading as follows:

(Language of said paragraph (6), included in order, omitted here.)

It is ordered, That pursuant to the rules and regulations for the determination and recovery of the excess income payable under section 15a of the interstate commerce act, as defined in our order of January 16, 1922, modified as may be necessary in the case of each respondent for the year ended December 31, 1921, each and every carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the provisions of the interstate commerce act, excluding—

(a) Sleeping car companies and express companies;

(b) Street or suburban electric railways unless operated as a part of a general steam railroad system of transportation;

(c) Interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight; and

(d) Any belt line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof, shall on or before May 1, 1922, report to the secretary of the Interstate Commerce Commission, Washington, D. C., the following matters:

1. The amount by which its net railway operating income as defined in paragraph (1) of section 15a of the interstate commerce act, for the year ended December 31, 1921, was in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, with explanation and details of the manner in which such excess income was computed, or in the event there was no such railway operating income, that fact, with corresponding calculations and details in support of the return.

2. Where it reports excess net railway operating income, the title of the fund account in which one-half of such excess was placed, the date when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held, and the amount of the remaining one-half of the excess income, as preliminarily computed, paid to the Interstate Commerce Commission and when and how such amount was paid. If the latter amount is unpaid, it should be paid by

remittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, secretary of the Interstate Commerce Commission, Washington, D. C.

3. The value of such railway property used in earning the income reported for the year ended December 31, 1921, with a statement in detail of the manner in which such value is arrived at and showing the ownership and a general description of such railway property.

4. The foregoing requirements of this order are made subject to the following proviso, that in cases where two or more of said carriers constitute a group under common control and management and operated as a single system, as provided in paragraph (6) above quoted, the foregoing matters shall be reported for the system as a whole, irrespective of the separate ownership and accounting returns of the various parts of such system, but shall also be reported in so far as practicable for each part of the system, and full explanation shall be made as to the method in which the values of properties of a group of carriers have been aggregated and the reasons why the group of carriers used are treated as under common control, management, and operation.

It is further ordered, that an original report and three copies of the same shall be forwarded to George B. McGinty, secretary, Interstate Commerce Commission, Washington, D. C. Reports shall be prepared in typewritten or printed form, on paper approximately 8½ by 11 inches, with 1½ inches margin at the left side for binding, except as to exhibits, which

may be of any convenient size, but which shall be folded to conform to the size of the report.

It is further ordered, that the original reports shall be made under oath signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

By the Commission, Division 4:

[SEAL.] GEORGE B. MCGINTY,
(Rec. 22-24.) *Secretary.*

In response to said orders appellant sent to the office of the Commission, under protest, two reports, one showing that, for the 10 months ended December 31, 1920, the amount of appellant's excess net railway operating income was \$21,666.24, and the other showing that for the year ended December 31, 1921, the amount of appellant's excess net railway operating income was \$33,766.99.

Thereafter, on or about December 6, 1922, appellant filed in the lower court its petition herein, in which, among other things, it alleged:

That the provisions of section 15a of the interstate commerce act relative to the payment of so-called excess income to the Commission, and relative to the establishment and maintenance of the so-called reserve fund therein referred to, and the construction placed thereon by the defendants herein, and the administrative acts of the Commission in pursuance thereof, and the said orders and demands of the Commission in respect thereto,

are each and all, as to complainant, null and void and wholly invalid, for that the same, and each of them, are in contravention of the fifth amendment to the Constitution of the United States, * * *. (Rec. 7.)

Appellant also alleged that said provisions of section 15a are in conflict with the tenth amendment to the Constitution of the United States.

The Commission filed an answer in which, among other things, it denied each of and all the allegations above mentioned, and also denied that said orders *require*, or that either of them *requires*, appellant to pay into a reserve fund, or to the Commission, sums of money as alleged in the petition, or any other sum or sums of money.

The prayer of the petition reads as follows:

(a) That a proper court be assembled, to which this petition and application may be presented and submitted;

(b) That on due notice to the defendants and to the Attorney General of the United States, and after hearing of this petition and application, this Court may issue its writ or process, temporarily staying and suspending the said orders of the Commission and each of them, so far as they relate to the payment of money to the Commission and into said reserve fund, and enjoining defendants and each of them from instituting or prosecuting any civil or criminal suit or suits against complainant or any of its officers or directors, or either of them, jointly or severally, until complainant can present to the court, on a day to

be fixed in said order, this its petition and application for an interlocutory injunction against the enforcement of said orders in the respects aforesaid;

(c) That after hearing, to be likewise held after due notice to the defendants and the Attorney General, there may issue out and under the seal of this Honorable Court a writ of temporary or interlocutory injunction, directed against the defendants, enjoining, restraining and suspending until the entry of the final decree the enforcement of said orders, and each of them, and the prosecution of complainant or its officers or directors, jointly or severally, in the respects mentioned in this prayer;

(d) That on final hearing this court enter its order perpetually suspending, vacating annulling and avoiding said orders of the Commission, and each of the same, as to complainant, and perpetually enjoining and restraining the enforcement of said orders, and each of them, in all respects, and each and every attempt thereat; and,

(e) For all such other and further relief, at law or in equity, special or general, as complainant, by virtue of the premises may be entitled to receive; and as in duty bound complainant will ever pray.

(f) Complainant further prays for service of subpoena and process upon the Commission, which service may be made on George B. McGinty, secretary of said Commission; and for service of subpoena upon the United States, which service may be made by filing a copy

of this petition in the office of the Secretary of the Interstate Commerce Commission and with the Attorney General of the United States in the Department of Justice; and service of subpoena upon Randolph Bryant, United States District Attorney for the Eastern District of Texas, which service may be made upon him in person, in Grayson County, Texas, the county in which he resides, or in Jefferson County, Texas, where he is temporarily sojourning and may be found. (Rec. 17-18.)

Appellant's assignments of error are twenty-eight in number, and appear to us to be covered, in substance, by the points included in the subject index of this brief.

ARGUMENT.

I.

THE ORDERS OF JANUARY 16 AND MARCH 16, 1922, WERE MADE BY THE COMMISSION AS A PROCEDURAL STEP DEEMED BY IT NECESSARY AND APPROPRIATE FOR THE PURPOSE OF ENFORCING, IN SO FAR AS WITH IT LIES, THE PROVISIONS OF SECTION 15a OF THE INTERSTATE COMMERCE ACT, BUT DO NOT, IN AND OF THEMSELVES, REQUIRE APPELLANT TO PAY INTO A RESERVE FUND OR TO THE COMMISSION ANY SUM OR SUMS OF MONEY.

The allegations contained in the petition manifest a disposition on the part of appellant to treat the orders of the Commission as *requirements* that appellant pay into a reserve fund and to the Commission, in equal proportions, the sums of money shown in the reports made to the Commission by appellant under protest, as net railway operating income received by appellant in excess of the income

of 6 per centum mentioned in paragraph (6) of section 15a, during the periods covered by the orders, respectively, but the language used in the orders does not justify such an interpretation. The language used in this connection is the same, in substance, in both orders, and pertinent words and figures contained in the order of January 16 are:

* * * shall * * * report to the secretary of the Interstate Commerce Commission, Washington, D. C., the following matters:

* * * * *

2. In cases where excess net railway operating income is reported, a statement of the title of the fund account in which one-half of such excess was placed, when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held.

3. The amount of the remaining one-half of the excess income as preliminarily computed paid to the Interstate Commerce Commission and when and how such amount was paid. If unpaid the amount should be paid by remittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, secretary of the Interstate Commerce Commission, Washington, D. C. (Rec. 21-22.)

It will be observed that, in connection with the reserve fund, the Commission confined itself to requiring appellant to report: The title of the fund; the date of its establishment; the amount of money

credited to it as excess net railway operating income, and an explanation of how the assets in the fund are represented or held.

It will also be observed that, in connection with payment to the Commission, appellant was simply required to report the time and manner of payment, if at the date of the report payment had in fact been made. However, the Commission stated that if the payment had not been made it *should* be made.

In other words, the orders, in so far as they relate to payments to the Commission, and placing in reserve funds, of excess income, are simply admonitory and intended to remind appellant of the requirements of paragraph (6) of said section 15a, which, as above shown, are:

If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof, shall, within the first four months following the close of the period for which such computation is made be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described.

II.

THE REQUIREMENTS CONTAINED IN THE ORDERS ARE FULLY SUPPORTED BY THE AUTHORITY CONFERRED UPON THE COMMISSION BY SAID ACT, AND ARE IN ACCORDANCE WITH THE DUTIES IMPOSED UPON THE COMMISSION BY PARAGRAPH (9) OF SAID SECTION 15a.

It will be seen that the requirements contained in the orders are confined to rules and regulations prescribed by the Commission for the guidance of appellant and other common carriers in preparing and sending to the office of the Commission reports pertaining to excess net railway operating income.

Authority to call for such reports is conferred upon the Commission by paragraphs (1) and (2) of section 20 of said act. In this connection we quote from the latter paragraph as follows:

* * * The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or by any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires; * * *.

And an examination of paragraph (9) of section 15a, above set forth, will disclose that the Commission is both authorized and required by that paragraph to prescribe the rules and regulations contained in the orders.

III.

APPELLANT IS NOT REQUIRED BY EITHER THE PROVISIONS OF SECTION 15a OR THE ORDERS OF THE COMMISSION TO INCLUDE INCOME ARISING FROM NONCARRIER SOURCES IN EXCESS NET RAILWAY OPERATING INCOME.

In paragraph (1) of section 15a it is provided that—

* * * “net railway operating income” means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

The reports made to the Commission by appellant, copies of which are Exhibits “C” and “D” to the petition, show that in computing its railway operating income the only items included by appellant were: Railway operating revenues; railway operating expenses; railway tax accruals; and uncollectible railway revenues, except that the latter item is not shown in Exhibit “C.” (Rec. 24-33.)

In paragraphs 7 and 8 of the petition appellant alleges that the reports mentioned were made by it in pursuance of the Commission’s orders. (Rec. 5.)

For the reasons above set forth we think it is clear that appellant is not required by either the provisions of section 15a or the orders of the Commission to include income derived from noncarrier sources in excess net railway operating income.

Although appellant’s petition contains a contention contrary to what has been said by us under this heading (Rec. 8-9), we do not find a corresponding contention in the assignments of error, and under-

stand the contention was abandoned by appellant upon the oral argument at New Orleans in the lower court.

IV.

IN THE PROCEEDING KNOWN AS EX PARTE 74 THE COMMISSION DID NOT FIX THE RATES, FARES, AND CHARGES FOR THE TRANSPORTATION OF PASSENGERS AND PROPERTY BY RAILROAD IN THE GROUP IN WHICH APPELLANT'S RAILROAD IS LOCATED.

In connection with the subject matter of the above heading, we quote from subdivision (a) of paragraph 13 of the petition as follows:

The Commission, acting upon the authority and direction of Congress as set forth in the transportation act, 1920, and in pursuance of the duties imposed upon it in that respect, in a proceeding known upon the docket of the Commission as ex parte 74, undertook to and did divide the railroads of the United States into groups, and fixed such rates, fares, tolls, and charges for each group as in its judgment and opinion would produce the fair return upon the value of the property devoted to public uses for common carrier purposes, as provided for in said act; and complainant avers that the rates so fixed by said Commission for the group comprising the territory in which complainant is located proved to be wholly and utterly inadequate, and too low to afford, produce or raise the net revenue upon property devoted to carrier purposes as contemplated and provided for in the aforesaid act; * * *. (Rec. 10-11.)

The report and order of the Commission in the proceeding referred to are dated July 29, 1920. The report will be found in 58 I. C. C. at page 220 et seq., and the full text of the order is:

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 29th day of July, A. D. 1920.

Ex Parte 74.

In the Matter of the Applications of Carriers in Official, Southern and Western Classification Territories for Authority to Increase Rates.

It appearing, That by its report entered in the above-entitled proceeding, which is hereby referred to and made a part hereof, the Commission authorized certain increases in the rates, fares, and charges of railroads within the continental United States;

It is ordered, That all outstanding unexpired orders of the Commission, whether or not effective upon the date of this order, authorizing or prescribing rates, fares, and charges which have or have not been published at the date of this order, and all outstanding suspension orders, be, and they are hereby, modified to the extent necessary to permit the increases herein authorized to be applied to the rates, fares, and charges authorized or prescribed in or maintained or held by virtue of said outstanding orders; but that in all

other respects said orders shall remain in full force and effect.

It is further ordered, That all tariffs or supplements changing rates now maintained or held by virtue of outstanding orders of this Commission shall bear on their title-page the following:

"Rates shown in this supplement (or tariffs supplemented hereby) published under authority of outstanding orders of the Interstate Commerce Commission are increased herein under authority of order of the Interstate Commerce Commission in docket No. 74 (Ex parte), dated July 29, 1920."

And it is further ordered, That a copy of this order be served on each carrier party to said orders and that a copy thereof be inserted in the docket in each such proceeding. (Rec. 62.)

It thus appears that the rates, fares, tolls, and charges referred to by appellant, which resulted from applying and putting in force increases authorized by the Commission, were not fixed by the Commission, but were fixed instead by the interested common carriers. In this connection, the lower court in its opinion said:

The carriers are not required to charge these rates; they are only permitted so to do, * * *. (Rec. 69.)

V.

THE MATTERS REFERRED TO IN SUBDIVISION (b) OF PARAGRAPH THIRTEEN OF THE PETITION DO NOT TEND TO SHOW EITHER THAT CERTAIN PROVISIONS OF SECTION 15a ARE UNCONSTITUTIONAL OR THAT THE ORDERS OF THE COMMISSION ARE INVALID.

The first paragraph of subdivision (b), above mentioned, reads:

Notwithstanding that the reports aforesaid show for the periods aforesaid certain net earnings in the manner in which the reports reflect the truth as of the respective dates of said reports, in so far as correct answers to the questionnaire of the Commission are concerned, yet, nevertheless, said reports do not reflect the true facts as to property values devoted to carrier purposes, nor as to the total final net earnings of either period, but are subject to pending claims and to all such claims as may hereafter be presented against complainant for which complainant may be legally liable, including claims for alleged overcharges collected during each of said periods, for loss and damage to property, for injury to and death of persons, and for claims by shippers with respect to the reasonableness, justness or legality of the rates, fares and charges collected by or participated in during such respective periods by complainant. (Rec. 11.)

In so far as the foregoing quotation relates to changes which may be rendered necessary by changes in the value of appellant's property, appellant is fully protected by a provision contained in the order

of January 16, which is included by reference in the order of March 16. In this connection we quote from the former order, which is Exhibit "A" to the petition, as follows:

* * * The value of such railway property as reported, will be corrected and the actual value will be determined in the manner provided in paragraph (4) of section 15a of the interstate commerce act, and corresponding adjustments in amounts recoverable by and payable to the Commission will be effected.
* * *. (Rec. 20.)

And in so far as the quotation from said subdivision (b) relates to changes which may be rendered necessary in the future on account of payments appellant may be required to make in connection with claims which accrued during the periods covered by the orders, appellant is fully protected by special instructions contained in the Commission's "Classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914," from which we quote as follows:

Accounts for operating revenues.—The accounts provided for operating revenues are designed to show amounts of money which a carrier becomes entitled to receive from transportation and from operations incident thereto.

Credits to the revenue accounts shall as nearly as practicable be upon the basis of accruals of revenue.

No charge shall be made against the accounts of this classification for amounts representing

tariff charges which for any cause are uncollected, the service for which the charge is made having been properly performed and individuals or companies being liable for the charges.

Accounts for operating expenses.—The accounts prescribed for operating expenses are designed to show expenses of furnishing transportation service, including the expenses of maintaining the plant used in the service. The accounting shall be as nearly as practicable upon the basis of accruals; however, the option is allowed the carrier of omitting charges to the accounts provided for the depreciation of fixed improvements and of including the depreciation (ledger value less salvage) of such property in the appropriate repair accounts at the time the property is converted or retired for replacement. (Rec. 62-63.)

That a carrier is authorized and expected to make adjustments in its accounts in one year because of payments made by it in connection with claims which may have accrued in a prior year is manifested by other provisions contained in said special instructions, among which are the following:

Balances in operating reserves.—If, at the end of a fiscal year, balances remain in operating reserves, the carrier shall indicate in detail in a formal report to the Commission the amounts therein, and the conditions causing the carrying forward of such balances, except as to balances applicable to personal injury or loss and damage liability, for which bal-

ances the carrier shall preserve in its files the details upon which such estimates were based. Separate records shall be kept of the operating reserve accounts for each year.

Interpretation of item lists.—Lists of "items," "details," etc., have been given as a part of this classification for the purpose of clearly indicating the application of the accounting rules in specific cases. The lists in every case are to be considered as merely representative and not as excluding from any account analogous items which happen to be omitted from the list appended. * * *. (Rec. 63.)

Unaudited items affecting operating accounts.—When for any cause the amount of any item affecting operating revenues or operating expenses can not be accurately determined in time for inclusion in the accounts of the month in which the transaction occurs, the amount of the item shall be estimated and in such form charged or credited to operating accounts and credited to balance-sheet account No. 78 [778], "Other unadjusted credits," or charged to balance-sheet account No. 727, "Other unadjusted debits," as may be appropriate, the necessary adjustments being made later when the item is audited. The carrier is not required to anticipate minor items which would not appreciably affect the operating accounts. (Rec. 63.)

In an order made and issued by the Commission in a proceeding entitled "In the Matter of a Uniform System of Accounts to be Kept by Steam Roads,"

dated April 26, 1921, and effective on and after January 1, 1921, it is, among other things, provided:

* * * If, on account of claims for personal injury or loss and damage being unsettled at the close of the year, the accounts for such expenses are not adjusted, the balances carried forward in the operating reserve account shall be analyzed as provided for in section 20 of these instructions.

Charges for stationery and printing and for advertising for a fiscal year shall be adjusted to the actual expenses. (Rec. 63-64.)

Since, in the ordinary course of business, sums of money paid by a carrier on account of claims like those referred to by appellant are included in the carrier's accounts for the years, respectively, in which the payments are made, regardless of the dates upon which the claims accrue, it appears to be a reasonable assumption that there are included in the reports made to the Commission by appellant, for the periods covered by the orders of the Commission involved in this case, sums of money paid by appellant during those periods on account of claims which accrued in some prior period or periods.

Pertinent language contained in the opinion of the lower court is:

We do not understand that the validity of a tax or exaction based upon yearly income, or an excess thereof over a stated per cent, is dependent upon it being permissible, in ascertaining such income or such excess, to deduct from the amount of gross income received

during the year both what is paid during the year in discharging liabilities previously incurred and also an amount to cover liabilities incurred during the year which remain unliquidated at the end of the year and when the return is made. Where the right to claim an overcharge exists, the repayment of such overcharge would be a charge against the gross income of the year when paid, as an expense of that year, just as payments made in the year 1922 on judgments rendered against a carrier are reckoned as an expense of that year notwithstanding the claim originated in an earlier year. It is not sufficiently probable that there will be such differences in the income of succeeding years as to make it likely that this method of dealing with this subject would not average itself. What are proper deductions to be made from gross income in ascertaining net income for a given period is a matter for legislative determination. (Rec. 69.)

The correctness of the opinion expressed by the lower court in the sentence last above quoted is called in question by No. 10 of appellant's assignments of error, which reads:

In holding and deciding that what are proper deductions to be made from gross income for the ascertainment of net income for a given period is a matter for legislative rather than judicial determination. (Rec. 73.)

We think it is apparent that the lower court simply intended to and did hold that the subject

matter referred to is within the power conferred upon the legislative branch of the Government, and that action taken by the legislative branch in connection with such matter will be reviewed in court only for the purpose of determining whether it is in violation of the Constitution, or fails to comply with statutory authority, or is arbitrary, within the judicial meaning of that term. Thus interpreted it is in accordance with the ruling of this court in *Procter & Gamble v. United States*, 225 U. S. 282, 297-298.

VI.

INCOME DERIVED BY APPELLANT FROM INTRASTATE TRAFFIC MAY PROPERLY BE INCLUDED IN THE BASIS UPON WHICH APPELLANT'S EXCESS NET RAILWAY OPERATING INCOME IS COMPUTED.

In connection with the subject matter of the above heading, we quote from subdivision (d) of paragraph thirteen of the petition as follows:

Complainant avers that a large and substantial proportion of the income earned or received by it and reflected in each and both of said reports as made to the Commission arose and accrued solely for and on account of rates, tolls, fares, and charges for the transportation of passengers and freight in intrastate commerce, conducted wholly within the State of Texas; that it is not within the power of Congress to take from complainant the earnings, or any part of the earnings, accruing to complainant from purely intrastate commerce; that to do so would be in violation of the tenth amendment of the Constitution of

the United States, and any law seeking so to do would be wholly void; * * *. (Rec. 13-14.)

Upon this point the ruling of the lower court was as follows:

That this levy is made on excess profits derived from intrastate as well as from interstate traffic is not a sound objection. Regarded as a tax levied by the Government it can be measured by the entire profit of the railway as well as by a percentage on that part of the surplus net income derived from interstate business. (Rec. 68.)

A contention similar to the one made here by appellant was made by counsel for forty-five States in *Railroad Commission of Wisconsin, et al. v. Chicago, Burlington & Quincy Railroad Company*, 257 U. S. 563, 578; and in replying thereto this court, speaking by Mr. Chief Justice Taft, said:

* * * The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. * * *. (Id. 586.)

Counsel for appellants are driven by the logic of their position to maintain that the valuation required for the purposes of section 15a to be ascertained pursuant to section 19a of the interstate commerce act (37 Stat. 701; amended 41 Stat. 493), is to be only of that part of the property and equipment of the interstate carriers which is used in commerce among the States and must be segregated from

that used in intrastate commerce. This is contrary to the construction which since the enactment of section 19a, March 1, 1913, the Commission has put upon that section in carrying out its injunction. It is inadmissible. The language of section 15a refutes such interpretation. The percentage is to be calculated on "the aggregate value of the railway property of such carriers held for and used in the service of transportation." To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not.

It is objected here, as it was in the *Shreveport case*, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original interstate commerce act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a State. To this, the same answer must be made as was made in the *Shreveport case* (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The

same men conduct them. Commerce is a unit and does not regard State lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, can not exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of State authority or a violation of the proviso. (Id. 587-588.)

* * * Congress in its control of its interstate commerce system is seeking in the transportation act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing State work. The affirmative power of Congress in developing interstate commerce agencies is clear. *Wilson v. Shaw*, 204 U. S. 24; *Luxton v. North River Bridge Co.* 153 U. S. 525; *California v. Central Pacific R. R. Co.*, 127 U. S. 1, 39. In such development, it can impose any reasonable condition on a State's use of interstate car-

riers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field. (Id. 589-590.)

Appellant admits that it is engaged in the transportation of passengers and property by railroad in interstate and foreign commerce (Rec. 2); and the control of which it complains, exercised by Congress, directly, and through its agent, the Interstate Commerce Commission, is only incidental and for the purpose of providing and maintaining an adequate national railway transportation system. As shown by the above quotation from the decision of this court in the *Wisconsin case*, such control may not properly be regarded as a violation of the Constitution of the United States. In this connection it will be observed that the provisions of section 15a relating to excess net railway operating income, taken together, simply constitute one step in the scheme of regulation devised by Congress in an effort to provide necessary and appropriate facilities for the transportation of passengers and property in interstate and foreign commerce even though also used in intrastate commerce.

VII.

THE PROVISIONS OF SECTION 15a RELATING TO EXCESS NET RAILWAY OPERATING INCOME ARE CONSTITUTIONAL AND THE ORDERS OF THE COMMISSION ARE VALID.

Under former headings we have discussed separately reasons advanced by appellant in support of its contentions that the provisions of section 15a of the interstate commerce act, relating to excess net railway

operating income, which were added to that act by section 422 of the transportation act, are unconstitutional, and that the orders of the Commission are invalid, but the allegations contained in the petition clearly show, we submit, that the correctness of the contentions concerning the orders is wholly dependent upon the correctness of the contentions pertaining to said provisions of section 15a. In other words, if the court concludes that the views advanced by appellant in connection with the provisions of law referred to are unsound, it will necessarily reach a like conclusion concerning appellant's contention that the orders are invalid.

At the time matters covered by the transportation act were being discussed Congress was confronted with the necessity of preserving and strengthening the interstate common carriers of the country and making them efficient and serviceable agencies for the transportation of interstate and foreign commerce, used also for the transportation of intrastate commerce. Under these circumstances we think it is obvious that the most important matter presented for consideration was the means by which the necessary railway operating revenues might be secured. After several months of discussion, deliberation, and reflection, Congress perfected and put into operation the plan described in said section 15a, which may be briefly summarized as follows:

In paragraph (1) the terms "rates," "carrier," and "net railway operating income" are defined.

In paragraph (2) the Commission is authorized and required to initiate, modify, establish, and adjust rates so that carriers as a whole, or as a whole in each of such rate groups or territories as the Commission may from time to time designate, will "earn an aggregate net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railroad property of such carriers held for and used in the service of transportation."

In paragraph (3) the Commission is authorized and required to determine and publish the fair return, but for the two years ended March 1, 1922, the return is fixed by Congress at $5\frac{1}{2}$ per cent of such aggregate value, except that the Commission is authorized to increase the return to 6 per cent.

In paragraph (4) the manner in which the aggregate value is to be fixed by the Commission is described.

Paragraphs (5) to (9), inclusive, relate to the control and disposition of net railway operating income received by a carrier in excess of 6 per cent of the value of the railway property held for and used by the carrier in the service of transportation.

Paragraphs (10) to (16), inclusive, relate to the use by the Commission for transportation purposes of the railroad contingent fund, in which one-half of the excess net railway operating income is to be placed.

The full text of paragraph (17) is as follows:

The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

And paragraph (18) authorizes the Commission to grant permission to a carrier to retain for a period of time not exceeding ten years' earnings derived by it from the operation of a new line of railroad in excess of said fair return.

As a result of the investigation made by it in the premises, Congress concluded that the scheme of regulation provided for in section 15a would enable some carriers to earn more than a fair return upon the values of the properties used by them, respectively, in serving the general public, and this conclusion it expressed in paragraph (5), which reads:

Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of trans-

portation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

For the purpose of enabling carriers to pay dividends, etc., in lean years, as well as in more prosperous years, Congress provided in paragraphs (7) and (8) as follows:

For the purpose of paying dividends or interest on its stocks, bonds or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under

paragraph (6) may be used by it for any lawful purpose.

In holding the provisions of section 15a, above mentioned, relating to the establishment and maintenance of a reserve fund, to be within the power of Congress, the lower court said:

As to the requirement that the rail carriers subject to the Transportation Act shall devote the remaining fifty per cent. excess over said 6 per cent to certain purposes, this does not take away any part of said fund from the carrier earning it. It only requires the carrier to hold and use it for certain of its corporate purposes.

We think that this is within the powers of Congress to order. *Wilson v. New, Receiver*, 243 U. S. 332, 347. (Rec. 70.)

This holding of the lower court is the subject-matter of No. 17 of appellant's assignments of error, which reads:

In holding and deciding that, as to Appellant, Section 15a of said Act, and said orders of the Interstate Commerce Commission, and each of them, requiring a certain portion of Appellant's earnings to be placed in a reserve fund, and prohibiting the use of such fund except for certain limited purposes, are not as to Appellant null and void, because taking Appellant's private property without due process of law and without compensation in contravention of the Fifth Amendment to the Constitution of the United States. (Rec. 74.)

In *McCulloch v. Maryland*, 4 Wheaton 316, this court, in speaking of the power Congress may properly exercise under the Constitution, said:

* * * Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. (Id. 420.)

Measured by this test, we think it is apparent that the holding of the lower court referred to is correct and must be sustained. As stated by this court in the *Wisconsin case*, *supra* (Id. 585), the end sought to be accomplished by Congress in framing the transportation act, including the provisions of section 15a above mentioned, was to maintain an adequate national railway system. That this end is legitimate will not, we feel certain, be controverted, and that the provisions referred to are appropriate and plainly adapted to that end appears to us to be equally clear.

It will be seen that in prescribing rates the Commission is both authorized and required to use as a basis the aggregate value of the railroad property of the carriers held for and used in the service of transportation, as a whole, or as a whole in each of such rate groups or territories as the Commission may from time to time designate, instead of, and as distinguished from, the value of the property of an individual carrier. It is therefore apparent that appellant's contention, that, as between appellant and the Commission, the general level of rates in the

group where appellant's railroad is located must be presumed to be reasonable, is unsound and can not be sustained.

In holding to be constitutional the provisions of paragraph (6) of section 15a, complained of by appellant, and which are usually called the recapture provisions of the transportation act, the lower court, among other things, said:

It would not be seriously questioned that in returning the railroads to their owners, after their use during the World War, the United States could have made an appropriation creating a revolving fund, and prescribed for its use in aiding railroads as is now provided in the Transportation Act of 1920.

It would be a reasonable exercise of its right to thus partly compensate for the use of their property, used in the manner above recited, during the period of Government operation.

Furthermore, by the Act of June 8, 1872, all of the railroads of the country are declared to be post roads. Rev. Sts. Sec. 3964 (U. S. Comp. Sts. Sec. 7456).

By the Constitution the Congress is expressly empowered "to establish post offices and post roads." Const. Art. I, Sec. 8, cl. 7.

Under this and other like powers the Congress has aided in construction of the trans-continental lines.

These powers would authorize aid to be extended in the manner prescribed in the Transportation Act to keep up and make efficient such railroads as needed the same.

The only question left, therefore, is as to the Government's right to raise this fund, so to be used, by requiring the railroads to pay to it one-half of the excess earned by them over certain percentages. It will be noted that no road earning any excess is relieved from this assessment.

The power of Congress to regulate interstate and foreign commerce includes power to adopt measures to aid and encourage such commerce. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204; *Mobile County v. Kimball*, 102 U. S. 691, 696. To promote those objects it may exercise its power of taxation. *License Tax Cases*, 5 Wal. 462, 470. It is not doubted that funds raised by legal taxes or exactions may be devoted to the purposes for which the revolving fund provided for is required to be used.

While the exaction in question is not denominated a tax it is in effect an excise tax levied on all carriers subject to the Transportation Act, payable from surplus earnings. In other words, the carriers are exempt from this tax who do not earn a certain per cent on their invested capital, and all are exempt up to this percentage of net earnings. All whose earnings exceed that amount are required to pay the same percentage of the excess to provide a given fund. In speaking of the raising of revenues for weaker lines, the Supreme Court, in *The New England Divisions Case*, says:

"In other words, the additional revenues needed were raised partly by a direct, partly by an indirect tax."

We see no reason why the United States can not measure this tax by the excess profit realized over a specified percentage.

It is the nature of the demand and not its name as given in the statute which determines if it is in truth a tax. *Helwig v. United States*, 188 U. S. 605, 613; *Fontenot v. Accardo*, 278 Fed. 871, 874. (Rec. 67-68.)

The Transportation Act provides that this fifty per cent of the excess over 6 per cent is not collected, or held, by the carrier for its own account, but as trustee for the United States, to whom it is to be paid. (Rec. 69.)

It is not perceived what right the complainant has, in this situation, to decline to recognize its liability to the United States and make payment to the Interstate Commerce Commission, as its designated agent. (Rec. 70.)

Regardless, however, of the power of Congress under the Constitution to provide for the levying and collecting of taxes, we think it is apparent that the provisions of section 15a, whose validity is called in question by appellant, may be upheld as portions of a scheme of regulation of interstate and foreign commerce which Congress has a constitutional right to create and put in force.

That the power to prescribe and otherwise regulate the rates, fares, and charges of common carriers engaged in the transportation of passengers and property in interstate and foreign commerce is legislative in character, and that Congress, directly and through such agencies as it may from time to

time designate for the purpose, may exercise such power fully and completely, is so well settled by decisions of the Federal courts that a citation of authorities in this connection does not appear to us to be necessary. A careful review of pertinent cases is contained in the decision of this court in *Houston, East and West Texas Railway Company v. United States*, 234 U. S. 342, where, among other things, the court said:

First. It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. * * *. (Id. 350.)

Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact “all appropriate legislation” for its “protection and advancement” (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures “to promote its growth and insure its safety” (*County of Mobile v. Kimball*, *supra*); “to foster, protect, control and restrain” (*Second Employers’ Liability Cases*, *supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of

conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard, or destroy it. * * * (Id. 351.)

The general rule to be followed by courts in cases like the one under consideration here was stated by Mr. Chief Justice Fuller in *McChord v. Louisville & Nashville Railroad Company*, 183 U. S. 483, as follows:

* * * The fixing of rates is essentially legislative in its character, and the general rule is that legislative action can not be interfered with by injunction. (Id. 495.)

Because of the facts and circumstances disclosed by the record in this case, and in view of the court decisions to which we have called attention, we are unable to see how this court can sustain either the contention of appellant that the provisions of section 15a relating to excess net railway operating income are unconstitutional, or its contention that the orders of the Commission are invalid, unless the court concludes that an application of the limitations prescribed by Congress and contained in paragraph (6) of said section would result in such a confiscation of appellant's property as is prohibited by the Constitution. We have shown that in no case do the limitations confine a carrier to a return of less than 6 per cent per annum upon the value of the

property held for and used by it in the service of transportation, and we are not aware of any decision of a Federal court wherein like limitations prescribed by Congress have been held to be unconstitutional. We are therefore of opinion that further discussion by us in this connection is not necessary and would not be appropriate.

For the reasons above set forth we insist that the appeal in this case should be dismissed.

P. J. FARRELL,

For Interstate Commerce Commission,

Appellee.

NOVEMBER, 1923.



In the
Supreme Court of the United States

OCTOBER TERM, 1923

No. 330.

DAYTON-GOOSE CREEK RAILWAY COMPANY }
v. } ss.
INTERSTATE COMMERCE COMMISSION, Etc. }

MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE AND TO EXTEND TIME FOR AND
TO PARTICIPATE IN ARGUMENT

And now comes National Association of
Owners of Railroad Securities, by Forney John-
ston, its counsel, and respectfully moves:

1. That leave be granted to movant to file
brief in the above-styled cause as *amicus
curiae*:
2. That the time for oral argument on the
submission of the above-styled cause,
assigned for argument on November
12th, be enlarged by an additional allow-
ance of forty-five minutes, or such time
as the Court may approve, and that
counsel for movant be granted permission
to participate in such oral argument and

be allotted such time as the Court may grant for that purpose by way of extension of the time for argument.

In support of this motion movant respectfully states that the case involves the constitutionality of the so-called excess earnings or recapture provisions of the Transportation Act, 1920 (Section 422, inserting Section 15a in the Interstate Commerce Act) which are deemed by the association of security owners, on behalf of which this motion is made, of general and paramount importance in the process of rate-making for competitive systems of interstate railroad.

The membership of movant includes the owners of a very large proportion of the securities of the American railways—probably in excess of 50 per cent principal amount of the entire funded indebtedness of the Class I railways of the United States—and movant regards the rate-making provisions of the Transportation Act, including the provisions for the adjustment of the competitive rate structure to the economic and constitutional requirements of the several carriers (generally referred to as the excess earnings or recapture clause), as indispensable to the sound and effective regulation of rates for competitive railway systems.

The economic and legal theory of the present rate-making provisions of the Transportation

Act, including the excess earnings clause above mentioned, were presented largely by movant to the Congress during the reconstruction of railway legislation which began with the investigation of the Newlands Committee in December, 1916, and resulted in the adoption of the Transportation Act, 1920; and movant is, accordingly, desirous in the public interest in transportation of presenting to this Court certain legal and economic aspects of the problems which are involved in the question.

Movant has ascertained that the filing of this brief as *amicus curiae* and movant's participation in the argument—should the Court extend the time for oral argument—is agreeable to the Solicitor General and to Counsel for the Interstate Commerce Commission; and has advised counsel for the appellant of its purpose to make this motion without notice of any objection on their part and feels assured that there is no objection.

Respectfully,
JOHN G. MILBURN

FORNEY JOHNSTON,

*Counsel for National Association of
Owners of Railroad Securities.*

November 5, 1923.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1923

No. 330.

DAYTON-GOOSE CREEK RAILWAY CO.,

Appellant,

v.

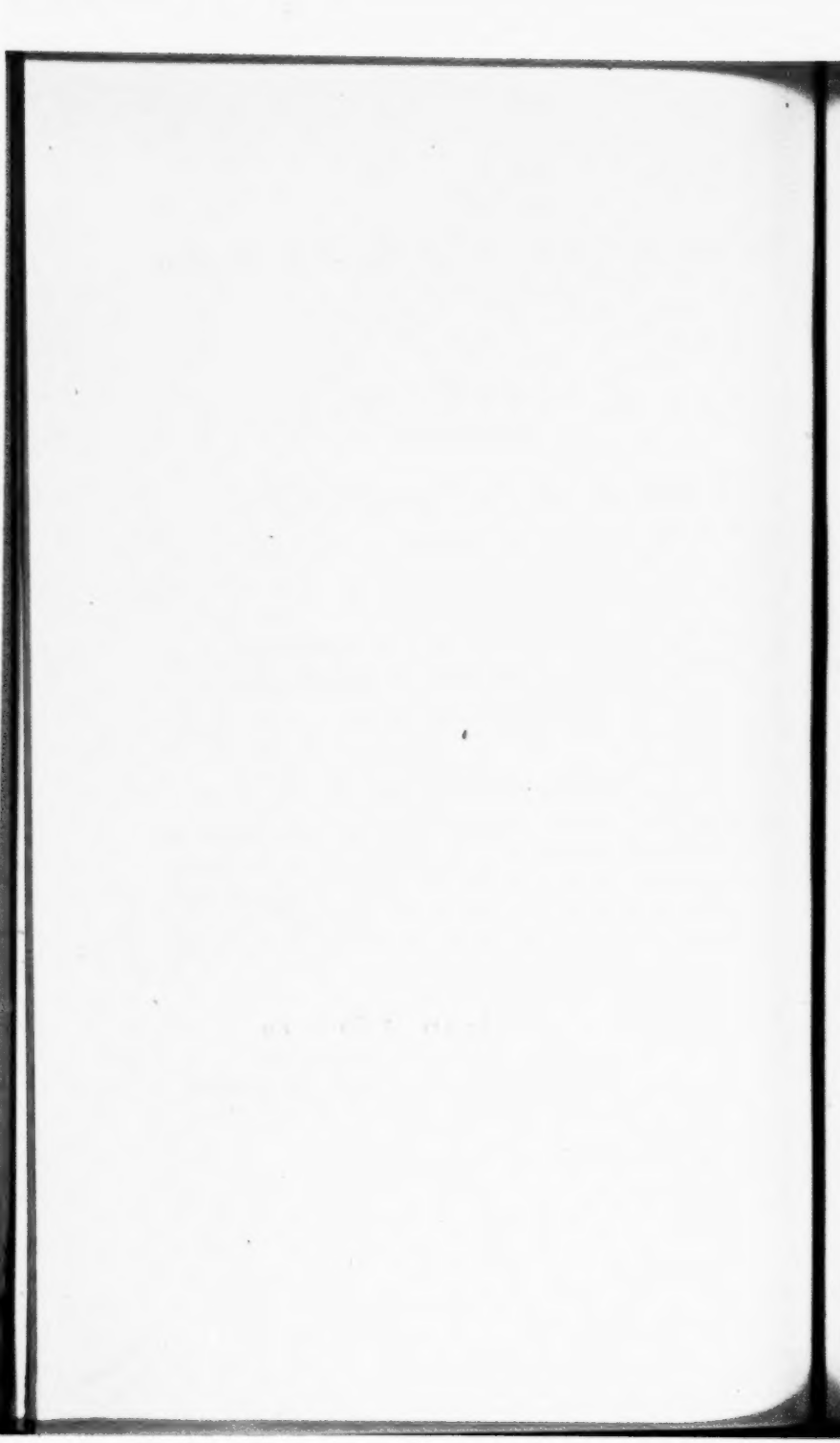
THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
ET ALS., *Appellees.*

BRIEF AND ARGUMENT

On Behalf of Amicus Curiae, National Association of
Owners of Railroad Securities, relative to the consti-
tutionality of Section 15a, Interstate Commerce Act,
as inserted by Section 422 of the Transportation Act
of 1920, Approved February 28, 1920, 41 Stat. L. 488.

John G. Milburn,
FORNEY JOHNSTON,
*Of Counsel for National Association
of Owners of Railroad Securities.*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1923

No. 330.

DAYTON-GOOSE CREEK RAILWAY CO.,
Appellant,

v.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
ET ALS., *Appellees.*

BRIEF AND ARGUMENT

On Behalf of Amicus Curiae, National Association of Owners of Railroad Securities, Relative to the Constitutionality of Section 15a, Interstate Commerce Act, as Inserted by Section 422 of the Transportation Act of 1920, Approved February 28, 1920, 41 Stat. L. 488.

PRELIMINARY

This brief and argument will deal with the application for preliminary injunction as presenting the single and decisive question of the constitutionality or unconstitutionality on its face, of the provisions of Section 15a of the Transportation Act relating to the regulation or reduction of excess carrier income gratuitously and condi-

tionally allowed the carrier, by requiring one-half of such excess, when ascertained and defined in pursuance of due process, to be paid into a general fund to be administered by the Commission as a by-product of effective rate regulation in the general public interest in transportation, and thus essentially in the interest of the shipping public which has paid the excess.

We conceive that the averments of the bill of complaint are broad enough to indicate a purpose on part of the Commission to press, in due course and in pursuance of the statute, a recovery of one-half of the excess earnings conditionally permitted the Dayton-Goose Creek Railway Company for the last ten months of 1920, and for the year 1921 and for each subsequent year, if and when earned, and that this purpose involves what may be technically termed a threat of a multiplicity of proceedings or suits all involving, if complainant's construction of Section 15a be correct, an identical question of law; viz.: the constitutionality of the theory of that section.

We concede that this situation would give rise to an equity—if we hypothesize the unconstitutionality of the theory of the measure—which might appropriately authorize the issue of an interlocutory injunction pending final hearing. The inconvenience to the Government or the Commission, should a temporary injunction be issued and subsequently dissolved, would be negligible, assuming the solvency of the complainant; and we therefore approach the discussion of the pivotal question, the constitutionality of the excess earnings clause, on the hypothesis that the rules and

regulations already promulgated by the Commission and complied with by the carrier carry the necessary implication of future and continuing action and are therefore orders already promulgated or in process of promulgation within the purview of Sections 208, 211, of the Judicial Code, the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219), and the Commerce Court Act approved June 18, 1911 (36 Stat. 539), 5 Fed. Stat. Ann. (2d Ed.), p. 1108 *et seq.*

In order that the issue of the constitutionality of the statute on its face—and not erroneous suggestions as to the lack of conformity with due process of the hearings and procedure of the Commission, instant and proposed—may be seen to be the sole and exclusive issue on this submission, it is desirable that we should point out certain misconceptions of the petition.

DUE PROCESS AS CONTEMPLATED BY THE STATUTE AND
BY COMMISSION'S REGULATIONS ADEQUATE TO
CORRECT ALL MINOR MATTERS
COMPLAINED OF

The orders thus far promulgated require the carriers to report the data as to excess earnings to the Commission. They contain a statement of the carrier's duty under the statute in these words, referring to the one-half of the excess reported by the carrier as covered by the excess earnings reduction clause:

*"If unpaid the amount should be paid
by remittance to or draft in favor of the
Interstate Commerce Commission."*

The Director's letter attached to the petition contains a like statement of the carriers' duty

under the Act. These admonitions plainly do not constitute a final or definitive order in the case of any particular carrier or for any specific amount. We entertain no doubt whatever that the statute permits recourse by appellant to the Commission to correct or adjust any of the minor matters complained of by the Dayton-Goose Creek Company. *As to these details* the Commission has made no final or definitive order. *They rest tentatively on appellant's own report.* If, as urged by appellant, the latter itself made a mistake in reporting its valuation on too low a basis, or did not set up appropriate reserves, that may be corrected. There is nothing in the record or in the act or in the regulations to suggest that appellant may not successfully have recourse to the Commission to correct any error or injustice in detail resulting from its own misconception of the procedure or otherwise.

It is to be conceded that the Commission will, perforce, proceed with the administration of the statute after due hearing, or opportunity for hearing, as to the final amount due from this carrier, unless restrained. This brings us to a consideration merely of the constitutional validity of *the basic theory of the Act itself.*

Much of appellant's brief is predicated upon the thought that its own return did not show the actual receipts, expense, income, valuation, or provide for desired adjustments. There is nothing in that situation to sustain injunction. Nothing save unconstitutionality of the provision in its entirety affords the basis for injunction.*

*The statute fully warrants hearing by the Commission before any conclusive adjudication or penal consequences can attach as

EXCESS EARNINGS WERE ADMITTED BY COMPLAINANT
IN REPORTS FILED BY IT

It is to be noted that under the Commission's order of January 16, 1922, and March 16, 1922 (Bill of Complaint, Exhibits "A" and "B"), the aggregate value of the reporting carriers' property called for by the report is the carriers' *own report of value*, adjusted by it to date, made by it in the first general rate adjustment under Section 15a (Ex parte 74, *Increased Rates*, 58 I. C. C. 220); or, if no such return was made, the property investment account of the carrier;† the order specifically providing that "the establishment of preliminary bases for pro-rating the return of six per cent, or ascertaining property values to which the rate is applicable, does not preclude any carrier from using such other bases *as it considers more equitable and in accord with the facts.*"

to any such details. There is nothing in the statute to suggest otherwise. Its plain and necessary implications [Section 15a (9)] are to the contrary. A final order that the carrier shall pay into the fund "all over a reasonable return," with penal consequences attaching to default, might be subject to the consequences of *United States v. Cohen Grocery Company*, 255 U. S. 81; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 222, etc.; but no such consequences can attach to a process of regulation contemplating the recovery, *after hearing*, of one-half of the amount over an ascertained reasonable return tentatively and conditionally permitted. *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 250. The procedure undoubtedly available to the complainant relieves the carrier of the necessity for guessing at the amount involved, with a penalty for guessing wrong. So much for the *statute*, so far as due process is concerned. A like conclusion attaches to the *procedure* before the Commission on that point.

There is nothing in the Act or in the regulations thus far promulgated or threatened suggesting that complainant will be denied a hearing constituting due process within the full significance of the principles announced in *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418; *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651; *St. Louis Land Co. v. Kansas City*, 241 U. S. 419, 430; *Missouri v. C. B. & Q. R. R. Co.*, 241 U. S. 533; etc.

†A *prima facie* measure fully warranted by the decisions: *Virginia v. West Virginia*, 238 U. S. 202 (*West Virginia Debt Case*); *Ames v. Union Pacific R. R. Co.*, 64 Fed. 165, 177, opinion by Judge Brewer.

This leaves the primary basis of report wholly open to selection by the carrier according to its own notions. On this basis the complainant conceded excess earnings subject to the Act, if valid, *on its own statement of its property value*, for the petition shows on the face of the reports made by the carrier itself (Exhibit C) that the Dayton-Goose Creek Company was permitted a rate level which enabled it to receive under and subject to the conditions of Section 15a and which will permit it to retain permanently the following amounts and ratio:*

Period	Value of property as stated by carrier	Net Railway Operating Income	Division of one-half of excess over 6% payable to general fund under Section 15a as reported by carrier	Approximate annual rate of return received by carrier before applying excess earnings reduction under Section 15a	Approximate annual rate of return received and to be retained by carrier after applying excess earnings reduction under Section 15a
10 months 3-1-20—	\$543,471.97 (Feb. 28, 1920)				
12-31-20....	\$613,994.82 (Dec. 31, 1920)	\$50,746.01 (10 mos.)	\$10,833.12	10.5%	Over 8.2%
Year 1921..	\$699,502.96	\$72,948.95	\$16,883.49	10.4%	Over 8%

For these reasons, on the face of the record and its own return, complainant by its own admission is complaining of a process of regulation which would leave complainant with a return of slightly over 8.2 per cent for the ten months of 1920 and of more than 8 per cent for the year 1921.

It will be well to recall in this connection, and as bearing upon the constructive purpose and intent of Congress in the adoption of Section 15a,

*These figures are based upon the carrier's own reports and not on what the Commission may after notice and hearing find to be the actual rate of return.

the rate of return on their property investment accounts earned by the operating steam carriers of the United States for the period 1908-1921, which is shown below :

Year ended June 30:	Investment	Net railway Operating Income	Return on Investment Per cent
1908.....	\$13,213,766,540	\$634,794,284	4.80
1909.....	13,609,183,515	710,574,052	5.22
1910.....	14,557,816,099	805,097,141	5.53
1911.....	15,612,378,845	744,669,102	4.77
1912.....	16,004,744,966	727,458,036	4.55
1913.....	16,588,603,109	806,800,960	4.86
1914.....	17,153,785,568	674,623,250	3.93
1915.....	17,441,420,382	694,276,111	3.98
1916.....	17,689,425,438	1,002,934,791	5.67
Dec. 31:			
1916.....	17,842,776,668	1,058,505,501	5.93
1917.....	18,574,297,873	952,647,110	5.13
1918.....	18,984,756,478	502,777,017	2.65
1919.....	19,800,120,717	454,969,169	2.36
1920.....	19,849,319,946	15,155,130	.08
1921.....	20,338,597,657	600,986,183	2.95

(36th Annual Report, I. C. C., December 1, 1922, p. 99.)

From these preliminary considerations it is plain that the only question before the court is the broad question of the constitutionality or unconstitutionality *on their face* of the provisions for the regulations or reduction of excess earnings, for the reason that if they can apply to any carrier they admittedly apply to the Goose Creek Company on the facts reported by it; or if those facts were erroneously stated they may be corrected on application to the Commission.

We preface the argument with a summary of the main propositions and authorities asserted.

MAIN PROPOSITIONS AND AUTHORITIES

I

The Commerce Clause of the Constitution confers plenary power on Congress, subject only to the Fifth Amendment, to regulate common car-

riers engaged in interstate commerce by any means having a fair relation to that end and deemed appropriate by Congress.

Minnesota Rate Cases, 230 U. S. 399, 411;

Houston East & West Texas Ry. Co. v. U. S., 234 U. S. 351;

First National Bank v. Union Trust Co., 244 U. S. 416;

McCulloch v. Maryland, 4 Wheat. 316; and

Osborn v. Bank, 9 Wheat. 738.

II

The power to regulate conferred by the Commerce Clause means to "foster," "protect," "conserve"; and our Federal system attaches to every power the necessary implication of duty where the public welfare demands the exertion of the power.

Second Employers' Liability Cases, 223 U. S. 1, 47;

The Daniel Ball, 10 Wall. 557, 577;

County of Mobile v. Kimball, 102 U. S. 691; and

Houston East & West Texas Ry. Co. v. U. S., *supra*.

III

In the process of regulation the United States may impose upon the agencies of interstate transportation a national policy of enforced isolation and competition, such as prevailed to an intensive degree between the date of the adoption of the Sherman Act and the adoption of the more constructive policy of the Transportation Act(a); leaving competing carriers without any lawful right to agree by concerted action on reasonable rate adjustments based on their average requirements and substantially confining the process of rate fixing to a consideration of the reasonableness

of individual rates when proposed or made effective (presumably without concert, although competitive in character) by the individual carriers affected (b).

- (a) *C. St. P. & K. C. Ry. Co. Case*, 2 I. C. C. 137 (Cooley, Chairman, advises cooperation);
U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290 (Mar. 22, 1897);
U. S. v. Joint Traffic Assn., 171 U. S. 505 (Oct. 24, 1898);
Annual Report, Attorney General, for year June 30, 1910, pp. 8 and 9;
28th Annual Report of I. C. C., 1914;
Keogh v. C. & N. W. Ry. Co., 260 U. S. 156;
- (b) *The Five Per Cent Case*, 31 I. C. C. 351, 355, 359;
R. R. Comm. v. Ill., etc., R. Co., 20 I. C. C. 181, 186;
See waivers by carriers necessary to secure consideration in the *Fifteen Per Cent Case of 1917*, 45 I. C. C. 303, 317.

IV

This process and its incidents made remedial rate regulation based on general revenue considerations a problem of exceptional difficulty (note, for instance, the rigid burden of proof—opinion of Commissioner Meyer, in the *Fifteen Per Cent Case*, 45 I. C. C. 303, 331, 334; the fact that certain of the carriers required no higher revenue—the *Five Per Cent Case of 1914*, 31 I. C. C. 351, 384; also the *Fifteen Per Cent Case*, *supra*; and see also the *Advance Rate Cases* reported in 9 I. C. C. 382, 404; and *Eastern Advance Rate Case*, 20 I. C. C. 243, 261) and, accompanied as it was by no effective provision for the control by the Interstate Commerce Commission of the relationship of the intrastate to the interstate rate struc-

ture, based on the important factor of carrier revenue as a primary consideration (*I. C. C. v. C. R. I. & P. Co.*, 218 U. S. 88, 109; *A. T. & S. F. R. Co. v. U. S.*, 232 U. S. 199, and cases cited; *I. C. C. v. C. N. O. & T. P.*, 167 U. S. 479), this condition plainly called for congressional action under the power and duty of conservation inherent in the Commerce Clause. *Message of President Wilson*, Cong. Rec. Dec. 7, 1915 (p. 99); *Newlands (Underwood) Resolution*, Cong. Rec. Feb. 22, 1916, p. 3421; *Wisconsin Passenger Fare Case*, 257 U. S. 563.

V

By the adoption of the Transportation Act Congress reacted to these urgent considerations and evidenced a purpose to deal with the agencies of interstate railway transportation on a basis that would enable them to survive and expand with the necessities of commerce. To that end it conferred on the Commission control over minimum rates, enlarged power over divisions, and announced a new policy as to consolidations, joint use of terminals and facilities, and intercarrier relations. Most important of all, it charged the Commission for the first time with direct and primary responsibility for the initiation and maintenance, on its own motion, of adequate rates for the carriers as a whole or by groups, with power to protect them and to conserve carrier revenue by requiring that the intrastate rate levels be made to conform. *Wisconsin Passenger Fare Case*, 257 U. S. 563; *New York v. U. S.*, 257 U. S. 591; *New England Division Case*, 66 I. C. C. 197; injunction denied in *Akron, Canton & Youngstown Ry. Co. v. U. S.*, June 3, 1922, by Judges Hough, Manton and Mayer, affirmed 261 U. S. 184.

VI

By Section 422 of the Transportation Act (inserting Section 15a in the Interstate Commerce Act) Congress asserted, in pursuance of its plenary power to define the economic necessities revealed to it after the most mature and prolonged inquiry, as a matter of fact binding upon the courts (a fact, moreover, which is within the judicial knowledge of the courts), that it is—

“impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property.”

This historic and economic assertion, being an inference obviously justified by the facts ascertained by Congress in the formulation of its post-war policy in regard to railway transportation, can not, legally or rationally, be ignored by the courts. *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 245: “In the enactment of these laws the Legislature of New York did not depend on the knowledge which its members had * * *.” *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170; *Block v. Hirsh*, 256 U. S. 135.

6 Ruling Case Law, p. 161-2 (Notes 11-13 and cases cited); *Ib.* p. 111, 112, 114, etc., and supplement Vol. 2, p. 31-2; *Muller v. Oregon*, 208 U. S. 412; *A. C. L. R. R. Co. v. Georgia*, 234 U. S. 280; *Calder v. Michigan*, 218 U. S. 591.

VII

Confronted with this ascertained "impossibility"—the long outstanding "insoluble" problem under the old basis of rate fixing—as the only alternative to "regulation and control in the interest of the commerce of the United States" of the excess realized by individual carriers over a reasonable return, built up, as it is, of an excess reflected surely but imperceptibly in each rate, Congress exerted the power of regulation over rates by impressing carrier revenues with a trust, when and as received, for reduction of such excess to the reasonable extent provided by the Act. Section 15a (6) Interstate Commerce Act (Section 422, Transportation Act, 1920).

VIII

By this process Congress proposes to allow the necessary competitive agencies of transportation to survive without contributing gratuitously and unnecessarily to excessive surpluses for individual carriers. The end being lawful and within the express power conferred on Congress to regulate (and conserve) the agencies of interstate transportation and the means adopted having a direct and rational relation to that end, no doubt can exist as to the power of Congress to put the process into effect unless the result is demonstrated to be confiscatory by a carrier complaining on its own account.

Authorities cited, Proposition I.

IX

Nor can doubt exist as to the power of Congress to control and regulate a surplus to accrue in the future, the creation, regulation or application of which is within the competency of Congress. The distinction between legislation dealing with a surplus or revenue received uncondi-

tionally by a carrier *before* the adoption of the legislation and revenue received after the adoption of legislation and subject to the trust thereby established, is fundamental. *Sinking Fund Cases*, 99 U. S. 700, 719; 138 U. S. 84.

X

(a) Congress, or the legislature of a State within its proper sphere, may group owners of property according to a legislatively ascertained community of interest in some public objective, such as an improvement area, a drainage project, or for the purpose of regulation or protection, according to what has been termed an "average reciprocity of advantage, although the advantages may not be equal in the particular case."

(b) No one would suppose that doubt could exist as to the power of Congress to group interstate carriers or to authorize the Commission to divide railroads into competitive groups, or to regard them as components of a single group nation-wide in its scope, for the purposes of more intelligent regulation, in further recognition of the already recognized unity of interstate transportation and of the necessity for emphasizing its essentially national character.

(a) *Wurts v. Hoagland*, 114 U. S. 606;
Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112;

Noble State Bank v. Haskell, 219 U. S. 104;
Jackman v. Rosenbaum, 260 U. S. 22.

(b) See Interstate Commerce Act as to Carmack Amendment and as to joint routes, etc., and the following authorities as to their joint or inter-carrier relations or interdependence, without statutes and under statutes.

RR. Com. of Ky. v. L. & N. RR. Co. (1904),
10 I. C. C. 173 (187).

Mo. & Ill. Coal Co. v. I. C. RR. Co., 22 I. C.
C. 39;

Mich. Cent. RR. Co. v. Comm., 236 U. S. 615, 629;
Houston & T. C. v. Mayes, 201 U. S. 321;
St. L. & S. W. Ry. Co. v. Arkansas, 217 U. S. 136 (147).

XI

No carrier which engages in interstate commerce has a right superior to the Commerce Clause to force its competitors out of business by competition in rates or, as the only alternative, to demand an excessive return upon the fair value of its property, it being clearly within the competency of Congress to avoid by appropriate regulation both alternatives stated.

I. C. C. v. Union Pacific R. Co., 222 U. S. 541.
Spokane Case, 15 I. C. C. 376.
Eastern Advance Rate Case, 20 I. C. C. 243, 273, 274.
Kindel Case, 15 I. C. C. 555, 9 I. C. C. 382.

XII

A benefit gratuitously conferred by Congress in the course of any lawful public object may be conferred conditionally and subject to an express program for its recovery without violation of the Fifth Amendment. While taxation for benefits conferred is not the process employed in Section 15a, the proposition is of universal application that the recapture of gratuitous benefits conditionally conferred (in this case an excess in rates which the carrier could not demand as of right) under a statute providing for their recovery does not constitute a taking of property; and the fact of benefits, though not the final ascertainment of their amount, may be determined by the legislature. This sound mechanism may be employed under the Commerce Clause.

Jackman v. Rosenbaum, supra, and cases cited Prop. X (a).

10 Ruling Case Law, p. 15-16; 25 id, 139-140.

Bauman v. Ross, 167 U. S. 548.

Spencer v. Merchant, 125 U. S. 345.

French v. Barber Asphalt Co., 181 U. S. 324.

St. Louis etc., Co. v. Kansas City, 241 U. S. 419.

Compare also the Workman's Compensation Cases (*e. g.*, *Mountain Timber Co. v. Washington*, 243 U. S. 219, 243, where the *quid pro quo* is recognized).

XIII

A carrier which has devoted its property to public use is entitled to demand no return in excess of a reasonable return upon the fair value of its carrier property (a). A common process for testing the reasonableness of rates as a whole is to test the result (b). Except in plain cases of confiscation, the courts ordinarily insist upon an actual test before inquiring judicially into their sufficiency (c). There exists no sound reason why Congress may not insist upon the same process for the purpose of regulation that the courts employ for checking the results of regulation. "A just and reasonable rate * * * must often be tentative, since exact results cannot be foretold" (d).

- (a) *Smyth v. Ames*, 169 U. S. 466: "such a corporation was created for public purposes. It performs a function of the State. Its authority . . . was given primarily for the benefit of the public," etc. (p. 544);

Covington, etc., Turnpike v. Sanford, 164 U. S. 578;

Wilcox v. Consolidated Gas Co., 212 U. S. 19;

Minnesota Rate Cases, 230 U. S. 454;

North Pac. R. Co. v. North Dakota, 236 U. S. 585 and cases tabulated;

Galveston Electric Co. Case, 258 U. S. 388.

Houston Telephone Case, 259 U. S. 318.

- (b) *I. C. C. v. U. P. RR. Co.*, 222 U. S. 541:
"Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return."

Northern Pac. R. Co. v. North Dakota, 236 U. S. 585: "When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business, and show that it has been denied a fair return on that value."

- (c) *Knoxville v. Water Co.*, 212 U. S. 1;
Wilcox v. Consol. Gas Co., 212 U. S. 19;
Lincoln Gas Case, 250 U. S. 256;
Newton v. Consolidated Gas Co., 66 L. ed. adv. op. 305, 308 (one year held sufficient).
- (d) *Springfield Gas Case*, 291 Ill. 209, 218, P. U. R. 1920 C, 640, 649, 125 N. E. 891;
Re Illinois Light & Traction Co., P. U. R. 1921 B, 549.

XIV

A common requirement of the courts in rate cases is to require a complaining carrier to impound a part of higher rates permitted, pending an injunction against the enforcement of lower rates asserted to be confiscatory, and to hold such fund subject to recapture and distribution under direction of the court according as such fund may prove to have been improperly received by the carrier. Is it rational to insist that Congress may

not adopt a less burdensome process than that employed by the courts in order to assure a reasonable return, plus the gratuitous excess allowed by Section 15a, by admonishing the carrier that it may administer the entire proceeds of the rates but must take them subject to the test of actual results and subject to the trusts created by the statute? The objection properly expressed in *Newton v. Consolidated Gas Co.*, *supra*, was that the court should not impound a fund to be disbursed according to a future schedule of rates to be approved by it, as the courts have no rate-making power. Congress and the Commission have that power.

The doctrine of a trust fund, created by statute or in some jurisdictions on general equitable principles, effective only on the judicial ascertainment of certain contingencies, is a familiar tradition in our jurisprudence (a). Is it possible that Congress has less power under the Commerce Clause to get at excess revenue in the most effective way in the public interest in transportation than the courts have in formulating simple processes for the disposition of assets in the interest of those equitably entitled to them? Excess revenue (rates) paid by shippers to certain carriers, under a system of regulation designed to protect their public interest in other carriers by conserving the latter as going concerns, may undoubtedly, under the Commerce Clause, be marshaled in the transportation interest of the public which has paid the excess to be thus regulated (b).

- (a) *Sawyer v. Hoag*, 17 Wall. 610;
Camden v. Stuart, 144 U. S. 104;
Fletcher, Cyc. Corp., Vol. 8, p. 8635.
- (b) *Provident Inst. for Savings v. Malone*,
221 U. S. 660.

XV

The power of the rate-making authority to adapt the rate structure to the circumstances of the different carriers is undoubted. This could be accomplished through a system of classification, such as by classifying carriers according to their earnings(a), length of road(b), or other familiar principle of classification(c).

- (a) *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155;
Chicago, etc., R. Co. v. Wellman, 143 U. S. 339.
- (b) *Dow v. Beidleman*, 125 U. S. 680.
- (c) *Ames v. Union Pacific*, 64 Fed. 165;
Houston, etc., R. Co. v. Storey, 149 Fed. 499;
Commissioner v. Wabash R. Co., 123 Mich. 669, 82 N. W. 526;
 And see Note, 21 Ann. Cas. 191;
 14 Roses Notes (U. S. Sup. Ct.) p. 222.

XVI

A classification for taxation based on net income is too familiar to warrant extensive citation, and many statutes incorporating the railroads in early days recognized a limitation upon income (rather than upon rates) as an effective alternative method of regulating the rates themselves. In short, regulation may be made effective at either end of the hopper.

Laws, New York, 1828, Ch. 304, p. 13.
 And see early statutes listed in *Minnesota Rate Case*, 230 U. S. 352, at p. 412; also California Act construed in *San Joaquin Case*, 113 Fed. 930, 192 U. S. 201, which allowed rates to be adjusted so as to produce a given per cent upon the investment, and approved a reduction of the return from 18 per cent to approximately

6 per cent (p. 213). Also the statute held void for lack of certainty as to the ratio of return in *L. & N. R. Co. v. Comm.*, 19 Fed. 679.

XVII

A carrier cannot complain of the supposed violation by Congress of the right of a shipper. This familiar maxim is peculiarly applicable in cases of this nature. Compare the attempt of carriers to complain of discriminations against shippers and localities under the Interstate Commerce Act before the question of revenue consideration was brought to the front by the Transportation Act as interpreted in the *Wisconsin Passenger Fare Case*. *I. C. C. v. C. R. I. & P. R. Co.*, 218 U. S. 88, 109; *A. T. & S. F. v. U. S.*, 232 U. S. 199, and cases cited. Note, Ann. Cas. 1915 C, 60.

XVIII

On broader grounds it may be conclusively asserted that a shipper has no vested, common law, or constitutional right as an individual to any kind of rate, reasonable or otherwise. His common law right with reference to businesses affected with a public interest is strictly derivative, as a member of the general public. (See *Smyth v. Ames*, 169 U. S. 466, at p. 544.) By definition it cannot be superior to the interest of the general public affected, in virtue of which alone the so-called right exists at all. Obviously such "right" is subject to modification by Congress, as are all common law rights of the carriers themselves, in the lawful execution of its powers under the Commerce Clause in the public interest in transportation. *Brunswick & T. Water District v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537; *Wilson v. New*, 243 U. S. 332, 347; *N. Y. Cent. R. Co. v. White*, 243 U. S. 188, 198.

XIX

Congress may foreclose the reasonableness and legality of a rate as to a shipper but leave the question open as to the Government. *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156.

XX

The legislative authority may provide specifically as to the person (that is, shipper, consignee, or person actually injured) who shall be entitled to recover for an overcharge in a suit for reparation. As the law stands in cases of reparation, the shipper is authorized to recover, although he may have passed the excess to the consignee or on to the general public in the price of the commodity. There is no reason why Congress may not itself administer the amount of any *excess* over reasonable rates reflected in the excess earnings realized under a group rate structure, made up as it is of inadmeasurable items and paid by unascertainable persons, in the transportation interest of the general public which has paid the excess. *Southern Pac. R. Co. v. Darnell*, 254 U. S. 531, 534; *Provident Inst. for Savings v. Malone*, 221 U. S. 660.

INTEREST OF AMICUS CURIAE

Leave having been requested on behalf of National Association of Owners of Railroad Securities to file this brief as amicus curiae, some reference to the interest of that Association in the constitutional question involved is proper.

The Association, through its direct membership, represents a large proportion of the outstanding securities of the American railways. Included in this membership are mutual insurance companies, savings banks, and other mutual insti-

tutions of a public or quasi-public nature owning for permanent investment railway securities amounting in the aggregate to billions of dollars, including alike the securities of roads of high earning power and their less favored competitors. Organized before the entry of the United States into the Great War, this Association and its membership have since that time been actively and continuously interested in the effort to protect the credit and the service of the railroads as a whole. Their interest in the situation is national in its bearing. Their sole objective has been to urge and assist in maintaining a sound attitude on the part of the public and of public authority toward the transportation systems, and, as an indispensable condition to that objective, a just recognition by the carriers themselves of their public obligations and of their relation to transportation as a whole.

In pursuance of this objective the Association advocated the economic necessity for and the constitutional validity of the principles now embodied in Section 15a of the Interstate Commerce Act.

Being definitely convinced that the principle underlying Section 15a is not only sound and valid but that its nullification would break down the last barrier against Government ownership by reviving the "insoluble problem" of rate regulation, the Association was constrained to request leave of this Court to restate the considerations which were undoubtedly regarded by Congress as sufficient not only to warrant but to compel the adoption of Section 15a.

We respectfully submit that a just conception

of the provision can not be attained without a clear recognition of its historic and economic background and of the essential unity and inter-relation of the agencies of interstate transportation.

LEGISLATIVE DEALING WITH PROPERTY OWNERS OF GROUPS OR CLASSES

The grouping of property owners for the purpose of determining their relation to a common objective is well illustrated by the improvement cases, reviewed from their origin in and illustrated by *Bauman v. Ross*, 167 U. S. 548, in which the legislatively ascertained fact that benefit will accrue to the respective individuals of a betterment area, as distinguished from the indirect and general benefits resulting to the public as a whole, is recognized as consistent with due process, provided the particular property owner is accorded a fair hearing before the amount is determined. In short, benefits or gratuities conferred by statute may be recovered under legislative authority, without compensation, provided a fair hearing is given the property owner as to the question of amount. See Propositions X and XII, *supra*.

It is not of present interest to discuss the many classifications of this established legislative process, it being sufficient for our purposes that the gratuitous beneficiaries of any general public objective may be grouped and the amount of the special benefit accruing to each from the process may be recovered by the public. 10 Ruling Case Law, p. 15-16; *Bauman v. Ross*, *supra*.

The fact of the benefit may be conclusively ascertained and declared by the legislature,

Spencer v. Merchant, 125 U. S. 345, *French v. Barber Asphalt Co.*, 181 U. S. 324; 25 R. C. L. p. 139-140; leaving the question of distribution and amount to be determined after some fair hearing. *St. Louis etc. Land Co. v. Kansas City*, 241 U. S. 419; 25 R. C. L. p. 160.

So, under Section 15a, the necessity for grouping and the fact of benefit from grouping through the fixation of rates or acquiescence by Congress in rates at a level necessary to sustain the group, resulting in excessive benefits to individuals of the group, may be determined by the legislature leaving the question of amount to be ascertained after fair hearing.

Another instance of the legislative recognition of group interests *going far and radically beyond the process of Section 15a* is found in the bank guarantee funds under the administration of which, as asserted by the Supreme Court, "there is no denying that by this law (the Oklahoma Depositors' Guaranty Fund) a portion of its property might be taken without return to pay debts of a failing rival in business." In the case of the fund established under Section 15a the fund is intended for employment in floating equipment reserves or otherwise in the general public interest in transportation and not for the gratuitous benefit of a weaker rival. In those cases where loans are made to individual carriers, the objective is public (as in case of farm aid); the loans are made only on adequate security and the transaction is, properly considered, an investment of the revolving fund or its employment in the public

interest in transportation rather than mere aid to an individual carrier.

The theory of Section 15a is, of course, not the same as in the bank guaranty case, but what was said in *Noble State Bank v. Haskell*, 219 U. S. 104, as to the police power under consideration in that case, is plainly applicable to the *power of regulation* under the Commerce Clause. The latter is not a police power merely. It is a power to conserve the whole as well as to regulate the parts or agencies; so it includes all analagous exertions of the police power, among which is the power to give due consideration to the community of interest and inter-dependence which exists between the agencies engaging in businesses subject to public regulation. As said by the court in the *Haskell Case*, *supra*, with reference to banks, and as is plainly pertinent to the case of interstate railroads whose earnings and functions are directly subject to regulation in the public interest in transportation, "the power to compel beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if the Government is to do its proper work, unless we can say that the means have no reasonable relation to the end." No interstate railroad can survive and flourish, certainly not as an agency of interstate commerce, unless its connections are enabled to survive on a wholesome basis, and this can be accomplished only by adjustment of the rate structures to their respective reasonable necessities.

The power of the State, and, *a fortiori*, the power of Congress under the Commerce Clause, to

deal with the owners of property in their common or group relationship, could not be better illustrated than by the observations quoted by the Court in *Wurts v. Hoagland*, 114 U. S. 606, with reference to the enjoyment of strictly private property—in that case lands having a general or common relationship to the necessity for drainage:

"It is the power of the government to prescribe public regulations for the better and more economical management of property of persons whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation, such as the power of regulating the building of party walls; making and maintaining partition fences and ditches; constructing ditches and sewers for the draining of uplands or marshes, which can more advantageously be drained by a common sewer or ditch. This is a well-known legislative power, recognized and treated of by all jurisconsults and writers upon law through the civilized world; a branch of legislative power exercised by this State before and since the adoption of the present Constitution, and repeatedly recognized by our courts. The legislature has power to regulate these subjects, either by general law or by particular laws for certain localities or particular and defined tracts of land. When the Constitution vested the legislative power in the Senate and General Assembly, it conferred the power to make these public regulations as a well-understood part of that legislative power."

The inter-dependence of interstate carriers is well illustrated in relation to one of the fundamentals of transportation, such as car interchange, by the decisions and discussions in *R. R. Com. of Ky. v. L. & N. R. R. Co.* (1904), 10 I. C. C. 173 (187), and the group of cases cited in that opinion, which preceded the adoption of the provisions

of the Commerce Act relating to interchange of loaded cars, through routes, etc. After the latter provisions became effective, the following decisions out of a multitude are typical of the resulting relation: *Missouri & Ill. Coal Co. v. I. C. R. R. Co.*, 22 I. C. C. 39, and *Mich. Cent. R. R. Co. v. Commission*, 236 U. S. 615, 629.

And see *Houston & T. C. v. Mayes*, 201 U. S. 321; *St. L. & S. W. Ry. Co. v. Arkansas*, 217 U. S. 136 (147), as to interchange car relations, and the line of decisions construing the Carmack Amendment, such as *N. P. Ry. v. Wall*, 241 U. S. 87, etc.

We cite later the decisions relating to the rational extension of the integral or group theory of rate regulation made effective by the Transportation Act. The above references are merely to preface the fact that there is a relation between interstate carriers in respect to the problem of rate regulation as inevitable as that involving their physical functions of car supply, interchange, etc., and that a group basis for rate making is within the rational discretion of Congress.

INTER-RELATION AND ESSENTIAL UNITY OF INTEREST BETWEEN CARRIERS

Individual interstate carriers can no more hope to survive and flourish on the wreckage of their interchanges than an individual can hope to flourish in a panic or a nation in a world in chaos. It is not to be supposed that the Commerce Clause and the Fifth Amendment, or the courts in their interpretation of either, are blind to practical considerations which are known to everyone else. These considerations form so definite and so in-

separable a part of the theory, objective and result of Section 15a that the indulgence of the Court is urged for their careful statement in this brief, for no question more important to the survival of the existing system of transportation or to the fate of over twenty billions of dollars of investments in American railways can be brought indirectly before the Courts than is presented by the attack, made in this proceeding by the Dayton-Goose Creek Railway Company, and sundry associated railroads, upon the underlying basis of the rate-making provisions of the Transportation Act.

The chief objections urged before Congress to the validity of this legislation were assertions that it violated the due process and compensation clauses of the Fifth Amendment *as to the carriers* subjected to the regulation and that it interfered with some supposed constitutional right of *shippers*. To these objections have been added in the present case the suggestion of the bill of complaint that the regulation in some way invades the legitimate province of the State in respect to intra-state rates. The former were stated in a letter from former Justice Charles E. Hughes to the Association of Railway Executives, which opposed the legislation before Congress and retained Mr. Hughes to state the case for the opposition. The letter is dated September 19, 1919, and was filed with the committees of Congress during their hearings in the course of the formulation of the Transportation Act, 1920.* We may assume that

* Hearings, House Committee, Return of Railroads to Private Ownership, p. 2981.

it states as cogently as possible the case for the opposition to Section 15a in its preliminary form.

Mr. Hughes' opinion was directed to the original or tentative draft of Section 6 of the Senate Bill which was materially different from the provisions of Section 15a as finally adopted. The main provision of Section 6 relating to the regulation of excess earnings, familiarly called the recapture clause, on which Mr. Hughes' opinion was invited and given is set out in the margin, as set out in his letter.*

As will be noted, the condensed statement of the principle of regulation through recapture thus set out in the original Senate draft omitted provisions essential to a thorough exposition of the theory now found in Section 15a, viz: the provisions stating the economic basis and necessity for the measure now embodied in sub-paragraph (5) of Section 15 (a), which deliberately recognizes and provides that excessive rates may be tentatively and conditionally allowed to be charged by partic-

* If any carrier shall receive from operation in any year more than a fair return, to be determined by the commission, upon the value of its property, held or used for service in transportation, which may include a just allowance to provide reasonably for future years in which there may be insufficient earnings, the excess above such fair return shall be paid to the board within the first four months of the succeeding year, to be invested or expended for the following purposes, namely: One-half of all such payments to the board shall be invested or expended for the purposes set forth in Section 25 hereof, and one-half thereof shall be deposited in a fund which, from time to time, shall be expended by the board in the purchase of equipment to be leased under proper terms to carriers in order to facilitate transportation, or to loan to carriers upon reasonable security in order to purchase equipment or other facilities in the event that such carriers are unable to secure elsewhere the funds with which to provide themselves with adequate transportation facilities. In no event shall surplus earnings in excess of the amount sufficient to pay a fair dividend, whether represented in reserves or otherwise invested in the property of the carrier, be capitalized or used in any way as a basis for increased rates." (From Section 6 of the Senate bill.)

ular carriers on a level high enough to enable their competitors to survive as a gratuitous and recoverable benefit, and that all revenues from such excessive rates are to be regarded as conditional and as received in trust, subject to regulation through subsequent recapture and administration in the interest of transportation as a whole. Section 15(a) (5) stating plainly this condition reads as follows:

"(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States."

The Senate draft criticized by Mr. Hughes also lacked the administrative provision, so desirable to assure due process, that the Interstate Commerce Commission shall prescribe reasonable rules and regulations for the determination and recovery of the moiety of the excess over a reasonable

return, which is now found in sub-section (9). The importance of this provision from a constitutional standpoint lies in the fact that it contemplates a full and orderly hearing and opportunity to the carrier in each case within the purview of the principles of due process referred to above.

Mr. Hughes' opinion upon the legislation in its final form was either not invited or not made public. The Conference Committee which finally agreed on the present draft of Section 15a included upon its membership such distinguished lawyers as Senators A. B. Cummins of Iowa, Atlee Pomerene of Ohio, Frank B. Kellogg of Minnesota, former president of the American Bar Association, Miles Poindexter of Washington, and Joseph T. Robinson of Arkansas, together with the Honorable John J. Esch, then Chairman of the House Committee on Interstate and Foreign Commerce, and now a member of the Interstate Commerce Commission. That committee in particular and the Congress as a whole had before it the views of the distinguish jurist and were not constrained to accept the theory of unconstitutionality thus urged.

In reply to this opinion of Mr. Hughes, a memorandum sustaining the validity of this provision was filed by the Advisory Counsel of the Association of security owners, Messrs. Elihu Root, John G. Milburn, John S. Miller, Hugh L. Bond, and Forney Johnston (House Hearings, *ubi sup.*, pp. 3001, 3009), in connection with which the following observation in the oral presentation of the matter to the Committee may be pertinent:

"It is important to bear in mind that the process of excess earnings regulation is based upon the establishment of rates upon a group basis—rates necessary to sustain transportation in each group. No shipper has a right to complain of rates necessary to sustain transportation considered in the aggregate. No carrier who is given rates higher than it would receive if the rates were considered solely on an individual rate or individual carrier basis can complain if Congress impresses a trust upon the excess.

"It could authorize this excess to be returned to the shippers, but that would be impracticable as the excess involved in each shipment would be negligible.*

"So Congress can clearly deal with this excess which is a by-product of the rational exertion of the commerce power in the general public interest in transportation."

Observations by Mr. Taft, in a special analysis of the Senate Bill forming one of a series of public papers in the Public Ledger during the consideration of the legislation, is of such intrinsic soundness, wholly without reference to his subsequent elevation to the position of Chief Justice, that they are set out in an appendix; as are the remarks by the then Director General (Mr. Hines), and by the late Judge Prouty.

In support of the principle and necessity of this legislation the executives of by far the largest

*And would, moreover, as we will point out, either defeat the object by destroying the competitive uniformity of the rates or result in potential discrimination as between shippers. *Keogh v. C. & N. W.*, *infra*.

single owners for permanent investment of American railroad securities urged the retention of the principle formulated in the Senate draft, asserting that:

"The only thing 'confiscated' is the opportunity for what may fairly be termed excessive return on the value of the investment."*

This expression was followed by a communication to the conferees on December 26, 1919, from like sources representing in that single communication an investment in American railroad securities in excess of two billion dollars; and the legislation as a whole had been urged upon the committees of the House and Senate by a memorial signed by more than 30,000 of the investing institutions and investors of the United States, directly representing an ownership of over \$9,000,000,000 of outstanding railroad securities and approximately 80 per cent of the resources of the United States ordinarily available for investment in railroad securities.

It goes without saying that this impressive group of owners of railroad securities could not have urged upon Congress the adoption of a proposal so novel, when superficially regarded, as the clause for encouragement of adequate rate levels,

*From "A Statement to the Public," Congressional Record, December 18, 1919, by Darwin P. Kingsley (president New York Life Insurance Company); Haley Fiske (president Metropolitan Life Insurance Company, New York); John J. Pulleyn (president Emigrant Industrial Savings Bank, New York); W. D. Van Dyke (president Northwestern Mutual Life Insurance Company, Milwaukee, Wis.); Louis F. Butler (president The Travelers' Insurance Company, Hartford, Conn.); and George F. Johnson (president Penn Mutual Life Insurance Company, Philadelphia, Pa.), Subcommittee.

by the regulation of excess earnings without the most profound conviction as to its economic necessity. The basis for this conviction and at the same time the impregnable constitutional basis for the legislation may well be introduced by a brief survey of the transportation problem as it existed during the period culminating with the seizure of the railroads by the President under the proclamation of December 26, 1917. It will be plain that the chief difficulty—the so-called insoluble problem—had been the difficulty of adjusting a competitive rate structure to the circumstances of the different carriers, the key log of the jam which was solved by Section 15a and is now assailed by the Dayton-Goose Creek Company.

HISTORIC AND ECONOMIC BACKGROUND OF SECTION 15A

Continental transportation may properly be stated to fall within the functions and affirmative obligations of government. *Olcott v. Supervisors*, 16 Wall, 678, 694; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 696; *Smyth v. Ames*, 169 U. S. 466.

The maintenance of highways has been governmental in character from time immemorial. The combination of the commerce, post roads and military clauses of the American Constitution bring transportation peculiarly within the group of duties imposed upon the general government. The opposition to Government ownership in America must rest, therefore, not upon constitutional theory, but upon the fact that if the railroads were taken over by the United States they would cease to be a competitive or regulated public

service and would so radically increase the waste, complexity and class reactions of the Federal organism as to constitute a menace to our social and economic institutions.

No one doubts the repugnance of the idea of Government ownership of railroads to established American political and economic theory—not because of the thought that the agencies of transportation may not constitute a function of Government in the sense above stated, but because of a deep and national conviction that Government ownership and/or operations would be justified only in case of the most exigent national and economic needs of our people; yet no one supposes that transportation will be allowed to break down or the people of any substantial geographical area to starve or to freeze, or to sustain grossly unequal burdens from car shortage or other inadequacy of transportation, without intervention by the general Government by virtue of its reserved powers under the commerce, post roads and war powers of the Constitution.

In so far as the agencies of interstate transportation are concerned it is indisputable that the power to regulate conferred by the Commerce Clause is not a mere negative or restrictive power. Inherent in the power are affirmative and constructive elements. Power reserved in the public interest carries a necessary implication of the duty to assert it when necessary. The following quotations are sufficient to make it plain that the Commerce Clause is not a mere negative or repressive provision:

"To 'regulate' in the sense intended is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and the public at large." (*Second Employer's Liability Cases*, 223 U. S. 1, p. 47.)

"Congress is empowered to regulate; that is, to provide the law for the Government of interstate commerce; to enact 'all appropriate legislation for its protection and advancement' (the *Daniel Ball*, 10 Wall. 557, 564); to adopt measures to 'promote its growth and insure its safety' (*County of Mobile v. Kimball*, 102 U. S. 691); 'to foster, protect, control and restrain.'" (*Second Employer's Liability Cases*, *supra*; *Houston, etc., Ry. v. U. S.*, 234 U. S. 342, 351.)

The grave and recurrent crises affecting the American railroads and threatening the duration of private ownership and operations under then existing methods of regulation were well known to Congress at the time of the formulation and adoption of the Transportation Act. Whether right or wrong as to the accuracy of the conviction, the Administration had taken over the railroads as a whole because of the impression that they were not sufficiently co-ordinated under private ownership and management as restricted by existing laws to meet the exigencies of transportation confronting the nation on December 26, 1917. While the measure was in conference the Director General (Secretary of the Treasury McAdoo), with the approval of the President, was

urging upon the Committees of both Houses a four or five-year extension of Federal operation of railroads.*

It is not to be denied that Congress recognized and reacted to the most definite understanding of the doubt whether, under the conditions arising out of the war and Federal control and under the disturbed economic relation of wages and costs and the prices of farm and other commodities to the cost of transportation, private ownership and operation could survive. Certainly they could not be expected to endure without the most courageous and constructive treatment of the entire problem, in process of which the full power and duty of conservation inherent in the Commerce Clause clearly had to be invoked to avoid the more drastic alternative of continued Federal operation or ownership. The full significance of the obligation of the Government to the railroads arising out of their seizure by the President is not always recognized. These conditions sensibly increased the necessity for relieving the railroads of the impossible conditions which were crystallizing as a result of the pre-war policy of regulation.

For these reasons, the Transportation Act, 1920, providing for relinquishment of Federal control, accomplished fundamental changes in the regulation of railroads. It provided for the extension of the regulatory power of the Commission to the farthest point consistent with private or individual initiative and energy. The Commission was given jurisdiction over the issue and the disposition of

*Bulletin No. 4, Rev. General Orders, U. S. R. R. Adm'n., p. 135. Also Senate Hearings, p. 104-6.

the proceeds of securities; over extensions, over the supply of cars and other facilities, over the joint use of terminals and over practically every form of inter-carrier relation, including the question of consolidations in the public interest.*

The system of public regulation begun in 1887 was carried to the point where any further extension of authority would have tended to accomplish the end which the grant of powers conferred upon the Commission was intended to avoid—Government operation.

This extension of power in the logical completion of the process begun in 1887, represents no reversal of statutory theory or policy; *yet its sweeping character necessarily implied an obligation on the part of Congress and its administrative agency, the Commission, to enable the carriers to survive and function on a wholesome basis.* Congress has under this Act attempted to discharge its part of the obligation by the adoption of Section 422, inserting Section 15a in the Interstate Commerce Act.

The House Bill proceeded along the old lines of regulation. The Senate Bill recognized that the history of the administration of the restrictive rate-making provisions of the Commerce Act, the existing status of railway credit and the radical extension of the process of regulation made obligatory the adoption of remedial legislation of the most decisive character if American commerce was to be served and Government ownership avoided. The Senate theory prevailed. It is a

*The far-reaching characteristics of the Act have been adequately described by controlling judicial authority, cited *infra*.

necessary purpose of this brief to discuss as briefly as possible the objective of Section 422 of the Transportation Act [inserting Section 15(a) in the Interstate Commerce Act] and the constitutional theory upon which it is based.

PREVIOUS INADEQUACY OF THE RATE MAKING PROVISIONS OF THE COMMERCE ACT TO AUTHORIZE FULL CONSIDERATION OF THE REVENUE NECESSITIES OF THE CARRIERS

Concurrently with the advance rate cases heard before the Interstate Commerce Commission beginning in 1910, there arose an increasing conviction that the procedure for adjusting rates prescribed by Section 15 of the Interstate Commerce Act was not sufficiently flexible to sustain the American system of transportation or enable it to expand with the high speed necessary to meet the requirements of commerce. The rate-making section of the Commerce Act was written around *the individual rate*. It did not tend to encourage consideration of the effect of these rates in their aggregate upon individual carriers or upon the carriers as a whole. And in those cases in which the railroads had taken steps which were of necessity concerted and in clear violation of the Sherman Act,* to secure contemporaneous advances in

*All that was decided in *Keogh v. C. & N. W. Ry. Co.* 260 U. S. 156, is that the shipper may not under the conditions there stated maintain an action under the Sherman Act for rates initiated in violation of that act but approved by the Commission or otherwise legal under the Commerce Act. On the contrary, the court asserts that "the fact that these rates (that is, rates initiated by concerted action on part of the carriers) had been approved by the Commission, would not, it seems, bar proceedings by the Government."

The history of the difficulties confronting the railroads in the effort to avoid destructive competition—at last placed upon a legal basis only with the adoption of the Transportation Act, which has

their respective competitive rate structures, the procedure and jurisdiction of the Commission came to be widely regarded as unsuited to the necessities of the situation.

Certain members of the Commission had objected to the consideration of the necessity for any general increase in revenue until the proposed ad-

charged the Commission with initial and plenary responsibility for adequate rate structures and with control over minimum as well as maximum rates—is most interesting.

Acting upon the advice of Judge Cooley, given to the carriers shortly after the adoption of the Commerce Act but before the Sherman Act, to the effect that their only protection from destructive competition lay "in the cultivation of reasonable relations among themselves, in mutual forbearance, and the application of a sense of justice to their mutual dealings and in their rivalries" (*C. St. P. & K. C. Ry. Co. Case*, 2 I. C. C. 137), the carriers entered into the traffic agreements which were denounced as illegal as in contravention of the Sherman Act by the Supreme Court in *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S. 290, decided March 22, 1897, and in *U. S. v. Joint Traffic Assn.*, 171 U. S. 505, decided October 24, 1898.

The concerted action necessary to inaugurate any general increase in rates, or, indeed, any inquiry to that end prior to the adoption of Section 15a was confronted by the possibility of injunction, as in 1910, the history of which is narrated in the annual report of the Attorney General for the year ended June 30, 1910, at pages 8 and 9. The history of the main general advance cases before the Interstate Commerce Commission prior to the Transportation Act, 1920, is also set out in the 28th annual report of the Interstate Commerce Commission for 1914.

The obvious illegality of concurrent action by the railroads in simultaneously filing advanced competitive rates is due to the fact that the act of initiation rested with the carrier and not with the Commission or indeed with the filing of the rate. *W. U. T. Co. v. Esteve Bros. & Co.*, 65 L. ed. Adv. Op. 653, 655.

It is a well-known fact that in several of the Advance Rate Cases particular carriers joined in the proceeding to initiate an advance in rates not because of any financial necessity on their part, but out of a regard for their more necessitous competitors. Compare the assertion of one of the carriers at the hearing in the *C., St. P. & K. C. Case* (2 I. C. C. 137): "Our reasons for making rates as above are as follows: At a meeting of the Northwestern Association, of which our line is not a member, but at which we were notified to be present, all the other lines urged us to assent to the rates (the 60-cent scale), which all said lines had adopted. We assented to said rates against our own interests for the sole purpose of assisting our competitors to regulate their local rates in accordance with their necessities, which they alleged to be very pressing."

vances thought necessary by the carriers had been allocated to specified rates or items and filed, for scrutiny as to the reasonableness, *per se*, of the individual increases proposed. *The Five Per Cent Case*, 31 I. C. C. 351, 355.

When the particular increases were thus filed and suspended as a whole for investigation and railway revenue was found to be inadequate there was further vigorous dissent against the subsequent granting of general relief by the Commission, on the ground that the action of the Commission in granting a horizontal increase would constitute "a new and radical departure and a most serious and portentous step, in that by this step the Commission is shown to deem itself justified in sanctioning these increased rates * * * upon consideration of general financial and operating results." 32 I. C. C. 337.

It was further objected that the necessities of the carrier had never been regarded as the test for determining the reasonableness of rates or rate structures; that the sole test is the reasonableness or unreasonableness of each individual rate *per se*.

These objections had some basis in the fact that Section 15 of the Commerce Act was founded primarily on the common law definition of a reasonable individual rate. Each transportation service was regarded by the common law as a separate equation having no necessary legal relation to results in the aggregate or to transportation as a whole; certainly no constructive relation.

The aggregate result might constitute an exces-

sive return upon the present fair value of the property or it might be so inadequate as to destroy the credit of the carriers involved and put an end to the extension of facilities and service; yet until February 28, 1920, the Commerce Act of the United States placed on the Commission little direct responsibility for viewing the problem from any broader standpoint than that of the reasonableness *per se* of individual rates and held out but little encouragement to substitute for the unit process a test based more appropriately on results.

This enforced indifference to net results was exemplified in a number of rate cases.*

In granting partial relief in the *Fifteen Per Cent Case of 1917*, 45 I. C. C. 303, a quorum of the Commission necessary to legal action responded to an appeal of the railroads for emergency relief by consenting to hear the proposal for horizontal increases without prolonged investigation as to specific rates and localities, asserting that investigations of such detailed character were not useful in the exercise of the functions which the Commission was called upon to discharge in determining the reasonableness of proposed rate increases covering the entire country.

The report of the case discloses that this procedure became practicable *only through waivers by the carriers of technical impediments, accom-*

*"A railroad company may be operated with a less return than it ought to enjoy or even at a loss, but neither condition of affairs would justify the exaction by it of rates that are higher than they reasonably should be for services performed, all things being considered." *Railroad Comm. v. Illinois, etc., R. Co.*, 20 I. C. C. 181, 186; *The Five Per Cent Case*, 31 I. C. C. 351, 359. See also *dictum* of Judge Brewer in *Cotting v. Stockyards*, 183 U. S. 79, which six of the Justices declined to follow.

panied by a pledge on their part that if any increases which might be allowed by the Commission were subsequently found by the Commission to be unnecessary they would promptly adjust their schedules accordingly. The necessity for accommodations of that character plainly indicated the lack of flexibility of the Act and the lack of necessary power in the Commission.

Although not satisfied as to the necessity for general relief at the first hearing, the procedure of the Commission in that case undoubtedly evidenced a disposition on part of a majority of its members to approach the matter from the broadest possible standpoint compatible with the statute. Yet it was necessarily recognized (p. 317), that in substance the issue was the reasonableness *per se* of the proposed increased rates rather than the question of the credit of the carriers and their necessity for general relief.

The proper economic basis for the determination of such inquiries was aptly stated by Commissioner Harlan in his opinion dissenting from the action of the majority in restricting the relief granted:

"The record in my judgment demonstrates a proposition that has long been clear to me, namely, that a rate is a public question and that the existing rates, aside from any interest that the owners of our railroads may have in the matter, could well be advanced in the public interest, in order that assurance may thus be given for the early enlargement of our transportation facilities."

The position, however, that the pending issue thus appropriately interpreted by Commissioner Harlan was one exclusively for Congress and not for the Commission to handle was asserted in an opinion by Commissioner McChord in these words:

"The issue presented is in reality one largely of governmental policy, rather than a question whether the rates sought to be made effective July 1 are reasonable for the service of transportation."

So we see that the administration of the Commerce Act was surrounded by formidable doubts as to the extent to which the Commission might give consideration to the underlying factors of credit and net income.

It is needless to suggest that the administration of the Act proceeded with the utmost difficulty under these circumstances and that a part of the membership of the Commission did not feel at liberty to give full consideration to the plain necessities of the carriers upon a hearing restricted to the question of general relief. Initiative was left with the railroads, but under the most embarrassing restrictions and limitations.

CONTROVERSY AND THE INSOLUBLE PROBLEM

A destructive attitude of hostility developed between shippers and railway managements. Class I railway net operating incomes dropped to 4.12 per cent of their aggregate property accounts in 1914, yet nearly two hundred appearances in the *Five Per Cent Case* of 1914 attest the vigorous opposition with which the request for additional revenue was fought. The report of the *Fifteen*

Per Cent Case of 1917 discloses five and one-half pages of protestants against the proposed increase. As a result of the hearings in the general advance cases it became increasingly evident that when the railroads required additional revenue to sustain their credit and the public service, the procedure established by the Commerce Act was unsuited to the rational and dispassionate determination of the question.

Other conditions of the Commerce Act, one procedural and one fundamental, deprived the Commission of necessary discretion and flexibility and proved additional stumbling blocks in the way of adequate relief before the Commission.

The express provisions of the Act placed the burden of proof upon the carriers to justify higher rates. This naturally resulted in a disposition, if not a peremptory duty, on part of the Commission to hold the carriers to a pretty definite discharge of that burden.*

The constructive administration of the Commerce Act was accompanied by a yet more fundamental difficulty, denominated by Senator Cummins during the hearings of the Newlands Committee as the insoluble problem. *The Commission had no power to adjust the competitive rate structure to the circumstances of the different carriers.*

In the first report in the *Five Per Cent Case* of 1914, 31 I. C. C. 351, it was recognized that the

*Thus in the *Fifteen Per Cent Case*, Commissioner Meyer, dissenting from the partial relief granted in that case asserted: "Before important action like this is taken the most conclusive proof of its necessity should be before the Commission," 45 I. C. C. 303, 331; also that the adverse ratios of the available four months of 1917 "do not necessarily predict unfavorable results for the entire year." *Ib.* 334, etc., etc.

net operating income of the carriers in official classification territory, considered as a whole, was smaller than was demanded in the public interest. The Commission said, p. 386, 403:

"Treating as one road the thirty-five railway systems that have joined in this application for our approval of a so-called five per cent advance in their freight charges, we have reached the conclusion that ~~their~~ net operating income is insufficient and should be increased."

General relief in that proceeding was denied, largely because of the Commission's disapproval of the items selected by the carriers for advances. The majority opinion, however, pointed out the disparity in net operating income realized by the various roads and asserted *that the condition of some of the carriers involved was so prosperous "that they clearly do not need a higher net income."* The denial of general relief unquestionably left many of the carriers with inadequate revenue. In like manner the denial of relief in 1917 was based in part upon the proposition that the admitted necessities of certain roads cannot justify a course of action that is unwarranted by the condition of the larger number of strong and successful lines.

It may be that no complaint of this situation is justified from the standpoint of the investors in the securities of the less fortunate railroad. They take the ordinary chances of competition and commercial disaster. *But the service of the public dependent upon these lines is a different matter;* and no system of regulation under the commerce

clause can be regarded as statesmanlike which fails to make an effort to stabilize credit and returns by adjusting the general rate structure to the necessities of the different carriers. No such effort was discernible in the Commerce Act.

RAILWAY CREDIT AND REVENUE THE PROBLEM BEFORE CONGRESS

The Commission had neither the power nor the responsibility necessary to avert a gradual breakdown in credit without evading the procedure contemplated by the Commerce Act or without producing revenue for certain carriers in each competitive territory which would have been so excessive as to impair the Commission's standing before a public not likely to understand the difficulty. Forced to choose between excessive revenue for certain roads and inadequate revenue for others, it followed the latter course in the first reports in those hearings brought on by the carriers in unavoidable violation of the Sherman Act. No better result was attained by the railroads themselves during the period in which rate initiative had rested with the managements. They were tied hand and foot with repressive legislation—State and Federal.

The impossibility of sound rate adjustments under the Commerce Act is well illustrated by the disparity in earnings experienced by Class I railroads under Federal operation. We find that during 1919 the Union Pacific earned 139.9 per cent of its standard rental, while the average for the Central Western Region was only 88.6 per cent. The Richmond, Fredericksburg & Potomac earned

243.1 per cent of its standard rental, while the average for the Southern Region was 52.9 per cent. These illustrations suffice to show that any general advance of competitive rates necessary to enable carriers indispensable to the public service to survive would have tended to produce excessive income for certain favorably situated carriers without the application of any additional energy or service on their part.

From this it results that the adequate regulation of railways under competitive private ownership required that broad powers of rate adjustment be given the Commission through the power to initiate rates and to control divisions of rates, etc., and that excessive disparity in results which might remain notwithstanding the exercise of a fair discretion in these respects, constituting a by-product of rate levels necessary to sustain transportation as a whole, should be further leveled by a fair regulation of excess earnings in the public interest.

All of this amounts merely to the rational adjustment of the rate structure to the circumstances (and the constitutional and reasonable demands) of the various carriers. The Commerce Act was wholly lacking in these fundamentals.

Under these inflexible conditions inadequate revenue from time to time and gradual disintegration of railway credit were inevitable.

The limitations and difficulties of regulation under the Commerce Act, because of the secondary aspect of revenue considerations and inability to adjust the rate structure, etc., will be graphically understood from a review of some of the more im-

portant proceedings before the Commission, among which may be cited: *In re Proposed Advances in Freight Rates*, 9 I. C. C. 382, 404; *Eastern Advance Rate Case*, 20 I. C. C. 243, 261; *Five Per Cent Case*, 31 I. C. C. 351; 32 I. C. C. 329, 337, 340, in which this pregnant suggestion was made by Commissioner Clements in the face of the problem found insoluble until the adoption of Section 15a:

"It is by no means certain that it would not, in the long run, be cheaper to the public to guarantee the bonds of the weak roads unable to meet their obligations rather than to try to take care of them by increased rates, which inure to the strong roads as well as to the weak."

And see 45 I. C. C. 303, 311, 331.

Surely no such alternative is necessary until Congress has fairly exhausted its efforts at constructive regulation and conservation under the Commerce Clause.

It was largely to meet these conditions that Congress adopted the Transportation Act of 1920. Failure to recognize these basic economic considerations to which Congress plainly reacted will result in a complete inability to visualize the purpose and intent or the economic or constitutional basis of that constructive measure.

May we have the further indulgence of Your Honors while we point out the historic steps by which Congress arrived at its conclusions?

INTENSIVE RE-SURVEY BY CONGRESS OF THE ENTIRE
RAILWAY PROBLEM RESULTING IN TRANS-
PORTATION ACT, 1920

Resulting from the considerations above mentioned and concurrently with their demonstration in the advance rate hearings beginning in 1910, there arose an increasing conviction that the restrictive and controversial basis of Section 15 of the Commerce Act prevented the Commission from viewing transportation as a whole or else from giving effect to its constructive conclusions. This thought was given official sanction in the message of the President of the United States, to be found in the Congressional Record for December 7, 1915 (p. 99), in which it was recognized that the transportation problem was an exceedingly pressing one. Congress was urged "to provide for a commission of inquiry to ascertain by a thorough canvass of the whole question whether our laws as at present framed and administered are as serviceable as they might be in the solution of the problem."

This message was appropriately interpreted by Senator Underwood as referring to the necessity for legislation to strengthen railway credit in order to avoid a breakdown of the transportation system. He asserted that the question was whether we were to avoid the next step—Government ownership—and whether the American people were willing to put up with an unsafe, inferior and inadequate transportation system, or have the intelligence to pay for one that would supply their needs. Cong. Record, Feb. 22, 1916, p. 3421. The Joint Committee, appointed in July

1916, to investigate the problem pursuant to the President's message and the Newlands (Underwood) Resolution, functioned until its duties were superseded by the war and Federal control. The Senate and House Committees took up the work where it was left off by the Joint Committee. The Transportation Act, 1920, approved February 28, 1920, is the direct result.

Before proceeding with the theory and purpose of that part of the Transportation Act directly involved in this proceeding (Section 15a), it should be pointed out that two of the other important departures accomplished by the Transportation Act in the effort of Congress to sustain by constructive regulation the agencies of transportation as a whole, have been reviewed and upheld and the radical transformation in regulatory theory worked by the Transportation Act have been observed and approved. First and most important is the decision in the *Wisconsin Passenger Fare Case*, 257 U. S. 563, in which was recognized the intention of Congress that the *revenue necessities* of the carrier should be regarded as a fundamental purpose of the Transportation Act and that these necessities could not be protected unless burdensome State rate structures were harmonized with the interstate rate structures; and that the regulation of railway transportation was for the first time by the Transportation Act placed on a truly national and constructive basis.*

*See also the *New York Passenger Fare Case*, 257 U. S. 591; *State of Texas v. I. C. C.*, *supra*.

As stated by Chief Justice Taft in the *Wisconsin Case*, the Act constituted a "new departure" imposing "an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States."

Of primary importance also is the *New England Divisions Case*, 261 U. S., 184.

Congress unquestionably sought to make effective, and as nearly automatic as possible, the administrative reaction of the Commission to the revenue necessities of the carriers as units of our general system of transportation and for the first time conferred upon the Commission the power to adjust the rate structure to the legitimate (and constitutional) requirements of the individual carriers while at the same time dealing with the carriers as a whole, or by groups, as the Commission might find necessary. On this basis and for this purpose the principle of grouping and of group rate-making and of group valuation was provided. This provision, with its necessary corollary, the recapture clause of Section 15(a), became, as heretofore suggested, the storm center around which controversy was waged before Congress during the formulation of the Transportation Act. It was adopted because Congress recognized that under no other condition could be justified a mandate to the Commission, more or less automatic in its nature, that would produce (the economic situation permitting) adequate revenue *and result, in the absence of the recapture clause, in unregulated excess earnings which would of necessity be produced in case of particular carriers if the rate level were pitched on a plane that would sustain the agencies of the transportation as a whole within each group.*

THE GROUP BASIS FOR GENERAL RATE ADJUSTMENTS

Before discussing in detail its constitutionality it may assist to state in the margin concisely the

effect of that part of the statute which precedes the recapture clause, viz.: the mandate that the Commission shall from time to time initiate on its own responsibility and maintain rates that will produce a fair aggregate return, under honest and economic management, upon the fair aggregate value of the railway property devoted to the transportation service.*

Grouping of carriers is contemplated for the more accurate and convenient execution of this duty. From the standpoint of administrative mechanism and public confidence grouping would seem essential, but whether embraced in one national group or in the familiar classification territories or otherwise, it would be incumbent upon the Commission to scrutinize the effect of rates upon the different carriers in order to see that the rate adjustments put into effect by the Commission were not unduly concentrated or monopolized.

The radical change lies in the direct mandate to the Commission to initiate and maintain rates that will enable the carriers as a whole or in the different competitive groups defined by the Commission to earn a fair ratio of return upon the aggregate value of the transportation machine in each group. After two years this fair ratio of return was to be ascertained and declared from

*This does not assure returns to individual carriers on any definite basis. It treats the railroads as a whole, or in such groups as the Commission may establish, as a single transportation machine which, in order to survive, must be enabled to earn a living return on its fair total value. What portion of the gross revenue each road will receive and earn from the rates pitched on this basis is left dependent upon ordinary considerations of location, competition and efficiency—subject to a limited but constructive power on part of the Commission to equalize inadequate revenue in the public interest through control of divisions and through the adjustment of local or non-competitive rates.

time to time by the Commission.* It must, first of all, be a fair rate of return on aggregate railway value, and in arriving at the rate the Commission must give adequate consideration to the transportation needs of the country and the necessity for the continual enlargement of transportation facilities in the public interest.

Adequate railway revenue is no longer even primarily a private matter. While changes in rates by carriers under Section 15 of the Commerce Act are on the old basis, the initiation of rates by the Commission is a new power pitched on a public basis and embraces control over the general level or relationship to general revenue of intrastate as well as interstate rates. State authorities proceed as heretofore in the adjustment of local rates, but must proceed in substantial harmony with interstate rate levels or adjustments established from time to time by the Commission under Section 422 of the Transportation Act. Hence responsibility in gross and in detail rests upon the threshold of the Interstate Commerce Commission, the national agency, a fact which has a definite legal bearing

*It has been placed at the 5% level in the hearing entitled *Reduced Rates, 1922* (No. 13293), 68 I. C. C. 676. The carriers recognize that economic conditions—and the law of diminishing returns—set limits upon railway revenue which can not be ignored. It is plain, from a practical standpoint and therefore from the standpoint of the Constitution, which does not ignore practical considerations, that rates could not be raised to a level that would increase the group return from the subnormal levels of 1919 (2.36%), 1920 (.08%) and 1921 (2.95%) to a full 6, 7, or 8% for the group without throttling commerce. The Commission has, accordingly, proceeded slowly and the carriers have demonstrated their faith in the constructive attitude of the Commission by acquiescing in the announced objective of 5% as the group ratio. Of course, if commerce will stand a better return, it is not to be doubted that it will be announced and made effective by the Commission to give effect to the wholesome and constructive purpose of Congress.

upon the right of Congress to regulate excess revenue, from whatever carrier source derived, produced under the new system of regulation.

**THE ARGUMENT AGAINST THE RE-CAPTURE CLAUSE
OVERLOOKS THE FACT THAT IT IS MERELY AN EF-
FECTIVE PROVISION FOR THE ADJUSTMENT OF
THE RATE STRUCTURE TO THE CIRCUM-
STANCES OF THE INDIVIDUAL CARRIERS**

The chief objection used against the provision both before Congress and in the present proceeding has been based upon the assumption that earnings are to be levelled by a retrospective act of seizure of earnings already received unconditionally by carriers, as a result of the application of rates declared by proper authority to be just and reasonable, and, therefore, lawful and final for all purposes. That conception of the process is erroneous.

The statute, as adopted, asserts in substance that in order to sustain competitive transportation as a whole, rates may have to be established which are intentionally higher than necessary to satisfy the private rights of sundry individual carriers, or to the discharge of their public duties. To the extent that the rates received by any carrier reflect an excess over a fair return upon its property, they are accordingly declared to be received tentatively and in trust for a transportation fund to be administered in furtherance of the public interest in transportation.

An analytical statement of the provision answers most of the objections which have been directed against it. Thus, in his letter dated September 19, 1919, referred to above, questioning

the constitutionality of that provision relating to the disposition of excess earnings as embodied in the original draft of the Cummins Bill (Senate 2906), Mr. Hughes bases his objections primarily on the criticism that, since the section provides that rates must be just and reasonable, they are therefore lawful, and that the provision for the recovery of any part of the earnings resulting from such lawful rates appears to be nothing more than a taking of property by the Government contrary to the Fifth Amendment.

His exact statement of the situation, as he saw it, is:

"If, however, the rates thus fixed, charged and received by a carrier are to be deemed just and reasonable for the services rendered, the carrier is entitled to these receipts as its property, and the taking by the Government of any portion of these receipts (except under a valid tax) for general Governmental purposes or for the benefit of other carriers would appear to be a taking of property contrary to the Fifth Amendment to the Federal Constitution."

We have already seen that a correct understanding and analysis of the process of excess earnings regulation is impossible unless it be clearly borne in mind that these rates, while final so far as the shipper is concerned, are specifically impressed with a trust when and as received by each carrier, to the extent that they may produce in the aggregate an excess over a reasonable return upon the property of the carrier held or used for the service of the transportation.

RATES ADJUSTED TO GROUP REQUIREMENTS

It is erroneous to conclude that they are just and reasonable for every carrier to retain merely because Congress has established them for the shipper to pay. They are to be established not for any particular carrier or for any specific service by any particular carrier. They are to be adjusted to a level necessary to sustain transportation in the aggregate or in the group. They are not, as erroneously assumed by Mr. Hughes, "deemed just and reasonable for the services rendered." On the contrary, they are expressly declared by the statute to be necessarily *in excess of what is just and reasonable* for the service rendered by particular carriers. They are nevertheless just and reasonable as a uniform rate for all shippers to pay, as it is obviously just and reasonable for the shipper to pay whatever is necessary to keep alive the essential agencies of transportation in competitive areas; but that is very different from the assumption that rates made on a group or aggregate basis have been declared to be "just and reasonable" as to every carrier and every service, or as to every shipper.

Any such conclusion rests upon the hypothesis that Congress must perpetuate that discredited method of establishing rates which is based exclusively on the cost or value of *each particular service*. Neither cost nor value of each service is capable of satisfactory proof. The cost varies with every shipment and with every carrier. The value of the service is different for every shipper. So in adopting the test of results in the aggregate as a material factor for the adjustment of rates,

Congress will be adopting, as far as it is practicable to apply the measure to groups of competitive carriers, the service at cost basis, determined by results in the aggregate, so widely employed in the case of local utilities. It is the final test uniformly applied by the courts in determining the reasonableness of rates as a whole and is a process squarely within the purview of the commerce clause. Bear in mind the established fact that:

"Where the rates as a whole are under consideration there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return." *I. C. C. v. P. R. R. Co.*, 222 U. S. 541.

Is Congress foreclosed from employing the more accurate mechanism?

RATES MAY BE TENTATIVE OR CONDITIONAL

The contention is then made that some of these rates may have been established in proceedings to test the reasonableness of specific rates, such as under Section 15 of the "Act to Regulate Commerce," and that surely rates so established cannot be regarded as carrying any excess—particularly where they happen to be non-competitive rates. *A complete answer to this suggestion is that Congress may undoubtedly make rates for the future for any carrier based on the best available data with the hope that the rate structure thus guessed at will produce a reasonable return, or it may permit rates which are relatively just and free from discrimination but which, so far as*

the carrier is concerned, are tentative and subject to the test of actual results. The former is prophetic and uncertain. The latter is absolute in its accuracy.

Is Congress to be denied the right to employ an absolute measure or a combination of the two methods because in the past it has employed, with unscientific and unsatisfactory results, the inaccurate method of prophecy? We find nothing in the commerce clause to warrant any such limitation and as long as specific commodities or integral railway services are not singled out for discriminatory action the carrier cannot complain of appropriate methods of rate regulation where a fair and reasonable return in the aggregate is assured to the carrier complaining.

**MODIFICATION OF SHIPPERS' SO-CALLED COMMON LAW
RIGHT TO DESTRUCTIVE COMPETITION OR TO A
RATE STRUCTURE THAT WOULD DESTROY
COMPETITIVE CARRIERS**

The criticism next seems to switch from the complaint of the carrier to a complaint on behalf of the shipper who would be unlawfully compelled, so it is said, to pay in rates the "unreasonable" excess to be recovered from any given carrier. Thus, as asserted by Mr. Hughes:

"On the hypothesis that the charges are unreasonable, the power to authorize them, no less than the power to collect them, falls. The exaction and maintenance of such charges would deprive shippers and passengers of their property without due process of law."

Of course, the carrier could not complain on

that ground. *I. C. C. v. C. R. I. & P. R. Co.*, 218 U. S. 88, 109; *A. T. & S. F. R. Co. v. U. S.*, 232 U. S. 199; and cases cited.

This suggestion also loses sight of the fact that rates may properly be made on a group basis. Of what "property" is a shipper being deprived when he is asked to pay rates that will produce a fair return on the aggregate railway property in any rate-making district? He has no constitutional right to insist that Congress shall make different rates for each carrier. He has no right to complain that rates are made with reference to aggregate or average conditions. He certainly has no right, superior to the commerce clause, to demand that Congress shall permit essential agencies of transportation to be destroyed through competition in rates. In suggesting the contrary the learned jurist, Mr. Hughes, overlooked an established practice by the Commission inconsistent with his views. *Spokane Case*, 15 I. C. C. 376, 392; *Eastern Advance Rate Case*, 20 I. C. C. 243, 273, 274; *Kindel Case*, 15 I. C. C. 555; 9 I. C. C. 382.

Congress has by this Act* almost completely suppressed competition in rates as being destructive of the carriers' ability to perform their public functions. And Congress has the undoubted power under the commerce clause to establish and enforce uniform rates in competitive areas that

* . . . giving the Commission jurisdiction over minimum as well as maximum rates and putting a final end to destructive competition (*Keogh v. C. & N. W.*, 260 U. S. 156) a power lacking in the Act as construed at an early date in its history. *C., St. P. & K. C. Ry. Co. Case*, 2 I. C. C. 137; *I. C. C. v. C., N. O. & T. P.*, 167 U. S. 479.

will produce an "unreasonable" return to certain carriers, if that process is necessary to sustain essential competitive lines. That excess cannot be repaid to the shipper. It would then constitute a rebate (exactly as observed in the *Keogh Case*, cited in the footnote) that would attract all competitive traffic and defeat the main objective, which is the survival of existing necessary agencies of transportation.

**RAILROADS MUST SURVIVE BEFORE THEY CAN BE
FORCED TO COMPETE**

The right of a shipper to have his commodities transported by each common carrier at a reasonable rate for each service, whatever that may mean if it implies anything contrary to the theory of the Transportation Act, is a mere common law right that is as much subject to the discretion of Congress under the commerce clause as was the common law right of carriers to pool their tonnage, to combine or to enforce the fellow-servant doctrine as to their employees. It was never a property right or a right protected against modification by Congress under the commerce clause. Many of the common law rights of carriers have been abrogated in order to enforce a competitive status among competing carriers. They must survive before they can compete. Any rate regulation found necessary by Congress to enable them to survive cannot be "unreasonable" from a constitutional or any other standpoint, and we have never understood that the legislation of Congress or its results must be found by the courts to be reasonable if it is appropriate and within the

scope of any of the powers delegated by the Constitution and does not run counter to some express constitutional limitation.

We touch this subject again at a later point in this brief at the risk of some repetition, but the question is too fundamental to warrant confusion. There has been so much misapprehension about the application of the maxim that rates must be reasonable to the shipper, that we set out in the margin the sound observations made in *Brunswick & T. Water District v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537, dealing with the immediate question of rates of a local utility supplying water to the public, but making plain that the slogan "*reasonable rate to the shipper*" means that the rate must be a reasonable rate for the public generally, not for the particular customer, and this means a rate reasonable for the public to pay to reproduce and sustain the service by the competitive agencies which the public policy of the United States demands in railway transportation.*

*The Court said " * * * We do not doubt that when the worth of a public service of this kind to the public or the customer is spoken of necessarily one of the elements to be considered is the expense at which the public or customers, as a community, might serve themselves were they free to do so. * * * When the worth of water to a consumer is to be estimated, we are not limited to the value of water in itself, for it is an absolute necessity. Its value has no limit. * * * In estimating what it is reasonable to charge for a water service, that is, not exceeding its worth to the consumer, water is to be regarded as a product, and the cost at which it can be produced or distributed is an important element in its worth. It is not the only element, however. The individuals of a community may with reason prefer to pay rates which yield a return to the money of other people, higher than the event shows they could serve themselves for, rather than make the venture themselves, and risk their own money to loss in an uncertain enterprise. It was said by us in the Waterville case that the investor is entitled to something for the risk he takes, and it is not unreasonable for the consumer to be charged something on that account. That is one of the things which make up the worth of the water to the customer. The same

The case cited is, we think, mistakenly criticized by Judge Prouty in *Eastern Advance Rate Case*, 20 I. C. C. 243, 273, 274, as being too restrictive upon the utility, since he considered that if the doctrine there stated were applied to competing railroads it would force the road having higher costs between competitive points to come down to the lower cost of its competitor. This does not follow under a sound system of regulation. The "community" or "public" whose interests form the criterion in such cases is *the general public*—and not the interest of an individual shipper or any of given community. In the case of interstate commerce the public interest involved is as broad as the commerce clause, and under the Transportation Act the public interest involved in any given inquiry is the national public or the public served by any group into which the carriers may be divided for rate-making purposes by the Commission, that is, a public served by *all of the roads*.

ADAPTATION OF RATE STRUCTURE TO THE RESPECTIVE CARRIERS AND THE PRINCIPLE OF CLASSIFICATION

It is in effect contended that Congress must finally establish the same rate for a railroad which hauls one bale of hay between two given points as it establishes for another railroad hauling a million bales between the same or compa-

element enters always into the relation between producer and consumer. * * *

"In the aspect now being considered, the worth of a water service to its customers does not mean what it would cost some one individual, or some few individuals to supply themselves, for we may be blessed with a spring and another may have a good well. *It means the worth to the individuals in a community taken as a whole. It is the worth to the customers as individuals, but as individuals making up a community of water takers.*"

able points, and that some constitutional right is violated if Congress or the rate-making authorities give adequate consideration to the factors of density or cost. It is perfectly obvious that any such contention is ill-founded. The common law imposes no such requirement. The spirit of the commerce clause affirmatively forbids any such destructive conclusion.

All railroads are not entitled as a matter of law to the same return for a like general service, *I. C. C. v. Union Pac. R. Co.*, 222 U. S. 541. In the *Covington Turnpike Case*, 164 U. S. 578, it was asserted that a road could afford to charge less toll by reason of dense traffic upon it than roads where the traffic was not so dense and that the legislative authority might appropriately recognize the distinction. Is it not clear that Congress may employ any appropriate method in order to give effect to the recognition of such distinction?

It may well be that Congress may desire the same rate charged for the same class of service; that is, equality in rates, so far as the shippers and passengers are concerned and in order to avoid discrimination (*Seaboard Air Line v. Florida*, 203 U. S. 261, 269); but this is fundamentally different from the assertion of that policy by a carrier in its own right.

The United States Supreme Court has always approved the propriety of classifying railroads according to their earning power, per mile or as a system, for the purpose of determining rates. Thus, in *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, a classification was held to be reasonable and proper which divided the railroads into classes

according to gross earnings per mile and permitted the different classes to charge different rates. That principle is now embodied in many rate statutes.* In the case last cited the Court said:

"It is very clear that a uniform rate of charges for all railroad companies in the State might operate unjustly upon some. *It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads;* and the general assembly in the exercise of its legislative discretion has seen fit to do this by a system of classification."

That is, in its last analysis, exactly what is accomplished by the provision objected to.

Confronted with the necessity that competitive rates must be uniform, Congress cannot adapt these rates to the circumstances of sundry carriers by making them unequal. The low rate would attract all of the business and destroy the competitor. Hence the only available process is to make the rates tentative so far as the carrier is concerned, subject to the test of aggregate result. It is a simple and effective adaptation of a rate fabric to the varying circumstances of individual carriers and squarely within the principle announced by the Supreme Court.

In *Dow v. Beidelman*, 125 U. S. 680, the court sustained a statute which fixed passenger rates at from three to eight cents per mile, *according to*

*For example it formed the basis of the Alabama statutes (that is, a classification according to earnings) for rate regulation set out in the Code of 1907, Section 5566. *R. R. Com. of Ala. v. Cent. of G. R. Co.*, 170 Fed. C. C. A.) 225.

the length of the road, approving *Chicago, etc., R. Co. v. Iowa, supra*.

In *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339, the court sustained the Michigan statute which fixes the passenger fares according to gross earnings per mile.

Other notable instances of classification along lines analogous to that employed in the Act are discussed in the following cases: *Ames v. Union Pacific*, 64 Fed. 165; *Houston, etc., R. Co. v. Storey*, 149 Fed. 499; *Commissioner v. Wabash R. Co.*, 123 Mich. 669, 82 N. W. 526. See note, 21 Ann. Cas. 191; 14 Rose's Notes 222.

The criticism referred to asserts that the process of regulating rates according to the result of those rates "confuses the Government's power over rates with an asserted governmental power over the amount of net earnings from lawful rates."

The error in that assertion is twofold. It assumes that rates may not be fixed tentatively and subject to the test of actual results, and that because they are made lawful they are necessarily final for all purposes.

If it were necessary to sustain the provisions relating to the disposition of excess earnings, it is demonstrable that these provisions are in effect merely a regulation of the individual rates collectable by the various carriers, worked out through a classification in accordance with the principle sustained in the cases above cited.

SCOPE OF COMMERCE CLAUSE

But it is not necessary to restrict the inquiry to such narrow compass. The commerce clause is

not a mere police power restricting Congress to a check upon individual rates, although it undoubtedly confers upon Congress as complete authority over individual interstate rates as is reserved to the several States over local rates in the assertion of their police jurisdiction.

The power to regulate commerce includes the power to adopt all appropriate processes to sustain the movement of commerce and preserve the essential competitive agencies through which commerce between the States is conducted. So long as individual carriers are not prevented by the legislation, as distinguished from the risks of the venture, from earning a fair return upon their property devoted to the public service, they cannot complain if Congress prefers to deal with rates in the aggregate rather than with each unit of service. It has long since become obvious to those observers who have remained open-minded upon the subject that commerce cannot be regulated in the public interest if Congress restricts its program of rate regulation to the unit measure basis.

The only limitation upon the legislative authority is that the regulation of rates, whether by units or in the aggregate, shall not prohibit the earning of a reasonable return upon the property employed in the public service. The power of regulation may be exerted to that *limit* by any appropriate process.

PRINCIPLE NOT NOVEL

The process of regarding results as the test or the limit for rates is not novel. That test was

among the earliest applied to American railroads, many of which began their existence with a charter limitation upon net income (Laws, New York 1828, chap. 304, p. 13). Judge Hughes cited nine similar statutes as a common form of early rate or earning restrictions in the opinion in the *Minnesota Rate Cases*, 230 U. S. 352, 454.

Until opposition was precipitated against this proposal, it had not been seriously contended since the decisions of the Supreme Court in the *Granger Cases* in 1874 that railroads have a right to realize or retain unlimited earnings or to net railway operating income in excess of a reasonable return upon the value of their property.

The State of Tennessee adopted a statute in 1883 providing for the punishment of any railroad which took, in rates, more than a "fair and just return" on its investment, *L. & N. R. Co. v. R. R. Com.*, 19 Fed. 679, 691-2. The Federal court declared the statute invalid, not because the legislature was without authority to restrict income to a fair and reasonable ratio of return, but because the statute failed to prescribe with the certainty necessary in a penal statute what was considered by the lawmakers to be a fair and just return which the railroad must observe. Of course, Section 15a avoids this difficulty (*Rent Cases*, cited 258 U. S. 242, 250, *supra*) which the *Lever Act* prosecutions did not avoid. (See footnote, pages 6 and 7, *supra*.)

The result of rates, as it was one of the first tests applied, is also one of the most recent. This fact is repeatedly illustrated in the ordinances

and agreements with street car lines and local utilities whose rates are in many cases tested and automatically adjusted according to results.

FUNDAMENTAL PRINCIPLES PLAINLY SUSTAINING
CONSTITUTIONALITY OF SECTION 15a

So much misconception of the process is due to vague constitutional theories invoked whenever the legislative authority finds it indispensable in the public interest to make novel applications of well settled powers, that a running summary of the controlling decisions is desirable.

(1) A carrier which has devoted its property to public use is entitled to demand no return in excess of a fair return upon the reasonable value of the property at the time it is being used for the public, *Smyth v. Ames*, 169 U. S. 466; *Covington, etc., Turnpike v. Sanford*, 164 U. S. 578; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19.

(2) Rates on particular commodities must not be confiscatory, but if particular or special rates yield a reasonable compensation, adequate total return is all that the carrier is entitled to demand, *Northern Pacific v. North Dakota*, 236 U. S. 585; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19; and in providing for a constitutional return the right of the public to be charged only what is reasonable and just for the service is a primary consideration, *Covington, etc., Turnpike v. Sanford, supra*. The Transportation Act recognizes that this last mentioned criterion is one for the benefit of the public which may be waived or modified by public authority; and that, if pressed inexorably, it may "kill the goose." The Act therefore asserts as the

fundamental basis of the new program that it is reasonable for the public to pay whatever is necessary to produce a reasonable return under honest and efficient management upon the aggregate value of the railway systems. We have fully discussed this so-called "shippers' right" which Mr. Hughes advanced against this policy and found that the term "shipper" merely refers to the public at large, whose rights are paramount over merely local or individual considerations, in the determination of a transportation policy.

(3) In pursuance of its wise objective, the systems of transportation are accepted by the Act as they stand. Their construction was permitted by the law-making authority. Whether originally justified or not communities dependent upon their service have grown up within their curtilage. So the Transportation Act properly takes hold of the greatest transportation machine in the world, as it now exists. Wasteful and improvident construction in the future is amply provided against by the sweeping control given the Commission over security issues and new construction.

(4) The Supreme Court repeatedly asserted, at the time of the original decision in *Munn v. Illinois*, 94 U. S. 113, that "where property has been clothed with a public interest, the Legislature may fix a limit to that which shall in law be reasonable for its use." It was originally held that this limit, when fixed by the Legislature, binds the courts as well as the public, *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155. This latter expression was, of course, cor-

rected in the latter cases, *Stone v. Farmers, etc., Co.*, 116 U. S. 307; *Georgia, etc., R. Co. v. Smith*, 128 U. S. 174; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418; and *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339, in which the principle was recognized that the right of "regulation" does not carry the power to destroy, and that the question of reasonable return on the property is, in its final analysis and subject to a broad legislative discretion, for the courts to determine as a matter of fact and not for the legislature as a question of policy or expediency; but the court has never abandoned the proposition that the power of regulation may be exerted to limit the carrier to a reasonable return upon its property employed in the public use. That formula was expressly asserted in *Smyth v. Ames*, 169 U. S. 466, and remains the final expression of the court, reaffirmed in a multitude of decisions, which may be found cited in the margin in *Northern Pac. R. Co. v. North Dakota*, *supra*, at p. 600, and concluding with the *Galveston Case*, 258 U. S. 388, the *Houston Case*, 259 U. S. 318, and the *New York Gas Case*, 258 U. S. 165; and later decisions.

The corollary to the general principle, above referred to, may restrict the carrier to net earnings amounting to less than what would, abstractly considered, be a fair return on its property investment, but that is a risk which the carrier assumes and is thoroughly established, *Covington Turnpike Case*, *supra*; *Interstate C. C. v. U. P. R. Co.*, 222 U. S. 541; *Northern Pac. R. Co. v. North Dakota*,

supra. The carrier fortunate enough to earn more than a fair return cannot complain if Congress elects either permanently or conditionally to waive any limitation upon its charges until definitely assured that the carrier will earn a fair return.

(5) It is obvious that the question what is a reasonable charge for each service is not capable of exact answer. The answer is always at best an approximation. It is almost invariably determined by the relation of the rate under analysis to other rates or established precedents or base rates.

On the other hand, the question of a fair return in the aggregate is a fairly easy question where, as under the Transportation Act, no necessity of separating interstate and intrastate earnings is involved (*Wisconsin Passenger Fare Case*). Hence, any argument that Congress cannot use aggregate return as a test, but must confine itself to the unit measure, would, if sound, prevent Congress from using the accurate and adequate test and force it to employ the admittedly erroneous and approximate unit measure, in which the chances for error increase inversely with the size of the unit and the entire process is a guess into the future.

No doubt is to be entertained of the fact that each carrier is entitled to impose a reasonable charge for each service performed, when all shipments of any given class of commodities or under any rate are to be considered. This has been too frequently stated to be a matter for serious con-

troversy. Thus in *Interstate C. C. v. U. P. R. Co.*, *supra*, it was aserted by Justice Lamar that the fact that the carrier's total income enables it to declare dividends would not justify an order requiring it to haul any particular commodity for less than a reasonable rate; but in that case the court very properly distinguished between proceedings involving a particular rate and *proceedings involving the rates as a whole* and asserted that "where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return"; and this distinction was clearly recognized in *Northern Pac. R. Co. v. North Dakota*, *supra*, where the court said: "When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business, and show that it has been denied a fair return on that value."

In short, the carriers may, in determining the question of constitutional return apply the gross test, with its stated limitations, and there is no sound reason why the Government may not employ a like measure in checking results for the purpose of regulation.

(6) The test, as to the limit of the police power of a State, as said by Justice Hughes in the *North Dakota Case*, *supra*, is dual and reciprocal; the railroad can deny the right of the regulatory authority to single out and require it to haul any class of commodities at a loss, and the rate-mak-

ing power can restrict the railroad's total net revenue to a reasonable return; but, conceding that the railroad is not forced to haul commodities covered by any given rate for less than is a fair rate to be charged for the service or less than is compensatory to some extent, the railroad cannot complain of confiscation if its aggregate return upon the property investment is reasonable.

If these considerations apply to regulation under the police power of the several States, is it not clear that the power to regulate commerce, vested in the general government by the Constitution, not only runs parallel with the police power reserved to the States over local rates but embraces all possible methods and processes having a direct relation to that end and deemed appropriate by Congress, provided the result is not in conflict with the Fifth Amendment?

FLEXIBILITY IN SOUND REGULATION

It has been shown that there is no merit in the contention that all railroads are entitled, as a matter of law, to the same interstate rate for a like general service under all circumstances. The contrary is frequently noted. Conditions are never identical, and *paramount over all criticism of that character is the commerce clause, which permits all rational regulation that does not reduce the earnings of the carrier below a reasonable return, is necessary to insure competition in service or other sound policy of regulation, and is based on other tangible and substantial requirements or classifications appropriate to the regulation of interstate commerce.*

Under Proposition XIV are stated analogous exertions by the courts of mechanism and practices found convenient in the administration of justice, such as the principle of impounding revenue pending a test of rates or pending a hearing and the more remote but quite analogous trust fund illustration. They present cursory illustrations of the expedients adopted by the courts in aid of a lawful objective which are not to be considered as beyond the power of Congress in dealing with the most difficult, the most complex, of all internal problems and the one affected with the widest public interest. It is manifest that the widest flexibility in treatment is necessary and no doubt should remain as to the power and discretion of Congress under the oft repeated doctrine declared by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat, 316, 421, constituting the most impressive of the great maxims which have come thundering down from his generation to our own:

"We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted

to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Before concluding, we shall revert to the question of the so-called right of the shipper—not because the carrier can assert it, but because it presents the only inquiry in connection with the theory of Section 15a which may properly be said to call for economic justification, since it is in the last analysis the shipper (and passenger) who pay the excess recovered in part from the carrier.

**FURTHER ANALOGIES AND FINAL OBSERVATIONS AND
SUMMARY AS TO THE SHIPPER AND THE ECONOMIC
JUSTIFICATION FOR THE CREATION OF THE
EXCESS EARNING IN THE FIRST INSTANCE**

The shipper's general remedy for specific overcharge is not proposed to be changed by the Act [Section 15a (17)], and no possible constitutional right of the shipper is infringed by the proposed process of excess earnings reduction.

The shipper has, unless and until changed by Congress in the general welfare, a common law right to have his commodities transported at a reasonable rate, but, as we have seen, that imposes no limitations upon any process found by Congress to be necessary to sustain and regulate the commerce of the nation. If the shipper pays slightly more to one carrier than he would if the rate level were determined accordingly to that carrier's condition, that consequence is necessary in the regulation of commerce, and he pays slightly less to other railroads than the rate authorities might properly allow. He has no right to insist that the fate of the agencies of transportation shall hang on his

asserted right to isolate for inquiry at any moment the question of every rate for every single shipment over any particular carrier.

Again, the excess paid to the stronger carrier is so slight as to each shipment as to be negligible under the principle of *de minimis*. It becomes appreciable only when the total revenue of the carrier is computed. Clear violation of a constitution is never *de minimis* but the constitution deals with practical and tangible considerations and is not sensitive to microscopic complaints against legislation necessary to move the commerce of a nation.

We have already adverted to the fact that the shipper's right to pay each carrier only what is the minimum reasonable rate for each service by that carrier is not an individual right secured by the Constitution against modification. It is, on the contrary, a derivative common law right, *based on the public interest with which the business is affected*, and is subject to any legislation found necessary by Congress under the commerce clause; for Congress can change the common law relationship between shipper and carrier whenever necessary in the public interest in the regulation of commerce, just as it has changed the common law liability and relationship between the interstate carrier and its employees, between the carrier and shippers in respect to limitations of liability, as well as other vital common law relationships found inconsistent with the regulation of commerce. *In fact, any legislation regulating commerce changes the common law status unless merely declaratory.* *Wilson v. New*, 243 U. S.

332, 347. Finally, the excess earnings to be received by sundry carriers are to be recaptured and expended in a very substantial sense in the interest of the service of the shippers who have produced them, such as in the acquisition of reserve or floating equipment which will directly tend to avoid car shortage and reduce operating expenses and rates.

A strictly analogous provision of undoubted validity is found in the Commerce Act, asserting that rates must be reasonable and authorizing an individual shipper to sue for reparation and by this means recapture the unreasonable excess earning received by the carrier on specific shipments under a rate which was at the time of shipment the published prevailing rate. Prior to the amendment of 1906 this was the only recourse possessed by the shipper against the imposition of unreasonable rates, who was nevertheless compelled by law to pay the published rate, whether reasonable or unreasonable. The difference between the right of Congress to make the rate final and legal as to the shipper and yet hold the question open as to the Government is established. *Keogh v. C. & N. W.*, 260 U. S. 156.

The consolidations contemplated by the Transportation Act of roads of dense traffic with roads of lighter traffic are nothing but grouping made absolute. It would be fatuous to suggest that the shipper has a right to prevent such consolidations on the theory that by forcing the light-traffic roads to remain independent and accept rate levels adequate for the roads of dense traffic the shipper

could get lower rates ~~than may~~ be demanded by the consolidated property.

In the present case the recapture of the excess is by the Government in pursuance of the power of regulation. The excess earning is administered for the general use of the shipping public, which has produced the excess, and in order to avoid the destruction of competition.

Analogies to this intervention by the Government for the transfer and administration of funds which the holder has no constitutional right to retain are not necessary to the argument, but one may be found in the Massachusetts statute requiring savings banks to pay over unclaimed deposits to the State Treasurer for administration by him as trustee. This constitutes no taking from the savings bank. *Provident Inst. for Savings v. Malone*, 221 U. S. 660.

An interesting and just analogy is the credit allowed on premiums on mutual policies resulting from an arbitrary loading of the premium level to cover prospective and unascertainable extra risk and expense. This loading almost invariably proves excessive and the difference between the amount loaded and the amount which actually proved necessary is returned under the insurance term "dividend."

"This difference, however, is not in any real sense a dividend. * * * This excess payment represents, *not profits or receipts but an overpayment*—an overpayment because, being entitled to his insurance at cost and having paid more than it cost, he is equitably entitled to have such excess applied for his benefit."

Mutual Benefit Life Ins. Co. v. Herold, 196 Fed. 199.

Connecticut Gen. Life Ins. Co. v. Eaton, 218 Fed. 188; *id. v. id.*, 218 Fed. 206.

Penn Mutual Co. v. Lederer, 252 U. S. 523.

(It is plain that the carrier need not pay income taxes on that part of its excess earnings paid into the general railway contingent fund, if it makes a proper return.)

The difficulty in many cases of determining who should recover and hold the excess over a reasonable rate paid in ordinary cases has resulted in the affirmative provision of the present Commerce Act that the shipper shall recover it, although he may have passed on the loss to the consignee, and the latter may have passed it on to the general public. As said by Justice Holmes in speaking of the Commerce Act in *Southern Pac. R. Co. v. Darnell*, 245 U. S. 531, 534, "the carrier ought not to be allowed to retain his illegal profit, and the only one who can take it away from him is the one that alone was in relation with him and from whom the carrier took the sum." This by no means intends to suggest that Congress can not follow the inquiry further as to the final incidence of any such excess.

The right of reparation for specific overcharge is left undisturbed by the Transportation Act. It would be clearly within the power of Congress to restrict reparation to the consignee or whoever finally sustained the damage due to the overcharge. There is, of course, no reason why Congress should not now recognize the fact that the burden and final incidence of the excess earning (to be conditionally permitted in order to sustain competition in service and adequately to regulate

commerce) would fall upon the general public, made up of indistinguishable persons and inadmeasurable amounts, and should, therefore, be recovered and administered by Congress for the general benefit of the public interest in transportation.

INTRASTATE EARNINGS

This excess earnings reduction involves no unconstitutional recapture of the earnings resulting from intrastate operations. In ordinary cases only about 25 per cent of the traffic of the railroads is intrastate, and about 30 per cent of the revenue is derived from intrastate business. The ratio in this particular case is higher, but Congress is not required to abstain from a rule of regulation because its necessary generality will not affect all units exactly alike. See authorities, Proposition X, *supra*.

It is common knowledge that intrastate operations are normally more expensive and the proportion of net earnings less, so, as a clearly established general rule the net earnings of interstate carriers will rarely ever equal one-third of their total. As it is proposed to permit them to retain all of their net earnings up to 6 per cent and one-half of the excess, it is clear that as a general rule this *one-half* will give them more than their total net earnings (not already embraced in the original 6 per cent) from intrastate revenue. If extraordinary cases exist, in which this shall appear not to be true, the railroad has recourse to the Commission under the reasonable rules prescribed and to be prescribed by it pursuant to the Act or to the courts to permit it to show that it is entitled to

retain a greater percentage of its excess earnings over the standard of 6 per cent plus the stipulated division over that ratio—authorized by the Act.

The foregoing answers the "intrastate" objection on the narrow basis on which it is urged. There is a conclusive answer on much broader grounds. Under the Transportation Act, the relation between intrastate rates and interstate rates is expressly subjected to the jurisdiction of the Interstate Commerce Commission (*Wisconsin Passenger Fare Case*, 257 U. S. 563; *New York v. United States et al.*, 257 U. S. 591); and where necessary to maintain the proper relationship the Federal body is given direct control over individual intrastate rates.

The recapture provision of Section 15a is a further express exertion by Congress of its jurisdiction over the interstate carrier. It is manifestly impracticable to provide for a segregation of the value of the carrier property engaged in interstate commerce from that proportion engaged in intrastate as a matter of routine regulation, or for a like separation of operating expenses. *Congress had the discretion to refrain altogether from the regulatory mechanism established by Section 15a or to apply it to the excess revenues of interstate carriers from whatever carrier operations derived.* It followed the latter course.

Of the plenary authority of Congress under the commerce clause to occupy the entire field of regulation of interstate carriers or to stop short at any point in its discretion, there can be no doubt what-

ever; and there can be no doubt that it is the purpose and intent of Section 15a to occupy so much of the field as is necessary to apply the test of reasonableness to aggregate carrier revenue, allowing the diligent and favorably located carrier to retain one-half of such excess. The result to the Dayton-Goose Creek Company is to leave it with a return of from 8 per cent to 8.2 per cent on its own asserted value of its property. It is difficult to discern confiscation in that result.

It is, accordingly, apparent that what are objected to as novel features are mere details in the mechanism employed to work out an established principle. At the time of the decision of *Munn v. Illinois* and the *Granger Cases*, it was asserted that regulation of rates meant the destruction of efficiency and energy, just as the opponents of this measure before Congress asserted that the proposal "is fraught with consequences to our institutions and to our national safety too serious to be encountered." The argument now and the argument in those earlier days is the same, and both have been properly characterized by the Supreme Court:

"Against that conservatism of the mind which puts to question every new act of regulating legislation, and regards the legislation invalid or dangerous until it has become familiar, government—State and national—has pressed on in the general welfare."

RESERVE FUND PROVISIONS

We attach slight importance to the provision of the Act relating to the reserve fund to be built up

out of the moiety of excess earnings retained by the carrier. Those provisions (that is, as to the disposition of such moiety by the carrier) are not, in our opinion, essential to the fundamental requisite stated by sub-section 5. They appear to be indispensable neither to the theory or mechanism of successful regulation, and we are, frankly, unconcerned whether they are held to bear a fair relation to regulation of rates of interstate carriers or not. Our impression is that the reserve fund provision is separable and might well fail without bringing down the main provision and processes of the section. We say this without any suggestion whatever of doubt as to the entire validity of the reserve fund requirement, for we have none. It appears to be reasonably limited in amount. After that limit is attained all additional sums retained by the carrier may be employed for any proper corporate purpose without restriction. For these reasons we waste no time in response to the prolonged discussion of the reserve fund.

THE QUESTION OF THE TAXING POWER

Appellant assails that part of the opinion below which suggests arguendo that the excess earnings provision is in effect an excise tax. We do not consider that conclusion in any sense necessary to sustain the provision. Undoubtedly there is a sound analogy in the process to the familiar recapture of benefits gratuitously conferred under the name of taxation. In this case the benefit conferred is the excess revenue over a reasonable return tentatively and conditionally permitted to the carrier. Such benefits are notoriously subject to

recapture by the state. We refer to this process in Propositions X and XII *infra* and have no doubt whatever of the correctness of the analogy. To that extent the Special Court was quite warranted in referring to the process as a species of tax; but that nomenclature is plainly unnecessary to sustain the legislation. It is, primarily and directly *regulation* and needs no other alibi. The mechanism employed has many sound analogies—but it is, after all, *regulation* under the Commerce Clause. The fact that the recapture of a gratuity is not violative of the Fifth Amendment is the important fact.

THE PRINCIPAL GROUNDS OF OPPOSITION TO THE
THEORY OF SECTION 15(a)

It has seemed certain to the association of security owners that the theory of section 15(a) is integral; that there is no hope for obtaining the salutary provision of paragraphs (2), (3) and (4) of the section or preserving those sections in the law without the provisions for the regulation of excess earnings which would inevitably be produced if the rate level produced under those paragraphs is pitched at a point which will sustain transportation as a whole.

It may be that this Court would hold that paragraphs (2), (3) and 4 might stand even if the remainder of the section for the regulation of excess earnings were declared invalid. We doubt that result as a matter of law. We are fully assured that as a matter of legislative expediency the hope to sustain paragraphs (2), (3) and 4

would be vain if the remainder of the section were declared unenforceable.

For this reason the association of security owners is profoundly concerned at the disposition of a limited number of the railroads to contest the sound integral theory of section 15(a). The section brings forward into rate making those essential revenue considerations which undoubtedly protected a large number of the American railroads from certain disaster as the railroads emerged from Federal control, through disintegration of their rates. It is today the one assurance that rate making—by state and by nation—will proceed on a rational and constructive basis.

We therefore consider that the position taken by the general counsel for the opposing lines is not only unsound in point of law, but in point of economics and legislative expediency when they urge that the rate making provisions be let alone and the remainder of the section be annulled (Brief of Messrs. J. P. Blair and others, p. 7).

They assert that paragraphs (2), (3) and (4) properly regulate rates—although its basic consideration is *revenue* and *return*, but assert that the provisions which they oppose are not a regulation of rates; that they merely take income not in and of itself a part of interstate commerce (*id.*, p. 8, *et seq.*). In short, paragraphs (2), (3) and (4) dealing with “fair return” is a regulation of rates, but paragraphs (5) *et seq.*, also dealing with “fair return” is not a regulation of rates.

Their suggestion mutilates the synthesis of section 15(a), which makes it plain that the

higher level of rates encouraged by section 15(a) in order to assure a fair return to the average carrier is primarily and from the outset conditioned upon the concurrent proposal for the regulation of the resulting excess over fair return to particular carriers which is being intentionally produced. The purpose to regulate the excess is, accordingly, from the outset an inherent part of the process of establishing the rate structure itself.

Of like nature is the suggestion (*id.*, p. 19) that rates are presumed to be reasonable and that a carrier has no right to "retain collections of transportation charges which are unreasonable." The fallacy of this suggestion has been fully discussed. It has been demonstrated that rates may be made final as to the individual shipper, in order to sustain transportation as a whole, but left as an open question to the government applying its regulations in the interest of transportation.

The chief point of attack on the process is based on the theory that those carriers for which excess earnings will be produced by the competitive level necessary to sustain the average carrier have a constitutional right to have this competitive advantage reflected in excess revenue (*id.* p. 24-41, etc). That is a conclusion which cannot be conceded. It is vigorously pressed not only as a basis for the argument that their revenue derived from competitive rates thus conditionally permitted, shall not be subjected to the test of reasonableness, but as a predicate for consideration in connection with valuation. It is insisted that this relative superiority of advantage is a property right which is

immune from regulation in terms of rates or revenue. Their superiority of location and circumstance is not "taken." Their real objection is that it may not be limited in terms of return under the Commerce Clause by any process which will adapt the rate structure to the status of a fair return on their properties, unless a like process is applied to their competitors—so that the *relative* earning power will be maintained. In short, they assert that their rates (and consequently their revenue) can be regulated only by making rates which are final and unconditional for all purposes—both for themselves and their competitors.

If they are correct that insistence brings about a portentous situation in transportation in America. It means that a large part of our systems will be forced out of business or to indefinite reorganizations each decade; for it is certain that a dollar invested in a line of secondary earning power is in close competition with a line of greater earning capacity can never hope to attain a fair and reasonable return on the new investment constantly required, on rates averaged down by the lower operating costs of the competitor.

This conclusion is inevitable because of an intensely practical consideration. It is obvious that neither Congress, the Commission nor the public will in the future—as they have not in the past—be willing to create rate structures which will produce what will be considered excessive returns for the more advantageously located railroad. So the position asserted by the opponents of this process is, in effect, a sentence of disaster.

This attitude of the opposition is not left in doubt. They insist that this "differential" in earning power, translated into revenue, is a property right which may neither be taken or regulated—although the owner is left with a reasonable return upon the full fair value of the property—all elements of value considered. That is a solecism on its face.

It is obvious that they are demanding—not the protection of value, but *value in relation to their competitors*—which is a very different thing. They might with much reason insist upon a constitutional or property right to exact a lower rate than their competitors because of the less cost of transportation over their lines. But they are willing to waive this right and charge a rate which is, as to them and in and of itself, unreasonable, provided it is made unconditional and they can retain all of it.

In short, they assent in effect that the process would be all right if there were only one railroad. It would be regulation that would not impair *relative* advantages, but it must not be permitted as to group competitive railroads.

We see no justification in that position. It threads opponents arguments (id. 25-28, etc).

A further thought that opponents advance is that the trust clause (paragraph (5)) is not competent to relate back to the rates themselves and is therefore inoperative and leaves the process essentially *ex post facto* in character. (id. 28, *et seq.*). That is a pretty narrow suggestion. We consider it unsound in fact; and irrelevant. The

essential fact is that Congress has in advance admonished the carrier of the process and that the revenue is received subject to the statutory mechanism. There is no constitutional reason why Congress could not refrain from regulating rates at all, leaving their excessive results to be regulated by recapture, under statute existing when collected, for administration in the interest of the shipping public which produced the excess.

Opponents attack the theory of classification (*id.*, p. 41, *et seq.*). We have fully discussed that subject (Proposition XV, *ante*) making plain that the regulatory agency may adapt the rate structure to the circumstances of the different carriers. This established process is plainly what is accomplished in a rational way by section 15a. That long established process, moreover, effectually disposes of the assertion of a property right, immune from regulation, to charge the same or a lower rate than a competitor; in short the revenue differential for which opponents contend.

The substance of the attack on this process is that such adjustment of the rate structure to the circumstances of different carriers is not practicable by the old methods because the carriers involved are in competition and the rates must actually be the same unless the carrier having higher cost of operation is to be dried up (*id.* 45-6). Section 15a has found the method of arriving at the objective without the adverse result; and counsels' quarrel is necessarily with the success rather than the validity of the process. Such objection in detail as is defined is that the recap-

ture has no rational relation to the rate and is not therefore "rate regulation." (id. 47.) We have seen that the Commerce Clause is not restricted to rate regulation in the common law sense—but covers regulation in all appropriate phases necessary to conserve commerce as a whole which leaves the particular carrier with a reasonable return upon the fair value of its property or a fair opportunity to earn it. But we do not agree at all with counsels' suggestion that it is not rate regulation.

NEW ENGLAND DIVISIONS CASE

Counsel's distinction of this case from certain comments in the *New England Divisions Case* (id. p. 51) is predicated upon an attempt to distinguish the bearing of public policy made effective in that case as applied to divisions of rates from the bearing of public policy made effective by 15a as to the revenue conditionally derived from rates. While the case cited is not decisive in fact of the question at bar the distinction attempted is not sound. It confuses principle with mere mechanism and amounts to no more than the contention that it is arbitrary and irrational to deal with rates through making them tentative as to their aggregate result and dealing with the result. We have fully discussed the rational process of regulation through dealing with results rather than with the guess basis of fixing individual rates. The effect of the rate making provisions in their entire operation is to apply both tests. They are tentatively made on the best basis practicable and checked by the actual test of results.

We do agree that the observation in the *New*

England Divisions Case, p. 191, suggesting that section 15a aids weak roads directly through the recapture from prosperous competitors of surplus revenue, is inadvertent, ~~is~~ as contended by counsel for the opposing railroads (*id.* p. 51). The direct advantage to the roads of relatively low earning power lies in the fact that section 15a makes possible a higher rate level through the assurance to the public and to the regulating agencies that exorbitant surpluses produced by such rate level in particular cases will be regulated.

In opening their second point, counsel for the opposition assert that the excess-earnings clause is not a rational regulation of rates for the reason that "the amount of net income is arbitrarily made the sole and conclusive measure of the unreasonableness of rates" (*id.* p. 52 et seq.) That objection is certainly untenable. Assuming the good faith of the carrier in its efforts in the direction of efficiency and in keeping its accounts, what test could be more rational and fairer than the test of actual results? We have shown that the courts frequently require an actual test before entertaining a suit to restrain rates. On what basis can it be suggested that Congress may not employ the absolute test of actual results?

Counsel assert (*id.* p. 54-59) that the test of net return is not an absolute measure for individual rates—that even if the return is reasonable, arbitrary action (such as the Dakota coal rate law—*Northern Pacific v. North Dakota*, 236 U. S. 585) will not be sustained. There is nothing in section 15a to interfere with this doctrine; but as we are

now dealing with rates in the aggregate it can not be asserted that a process which leaves a fair return is arbitrary. It is moreover too late to suggest that carriers have a constitutional right to insist upon rates in the aggregate which will produce more than a reasonable return and section 15(a) throughout deals with revenue or return in the aggregate. See Proposition XII, *supra*.

They also cite (*id.* p. 59) the Cotting Case in which a dictum of Justice Brewer (six of the Justices not concurring) exalted the reasonableness of the charge for each unit of service as the test, in and of itself, of reasonableness without reference to the aggregate result. A sufficient answer to the citation is that the unit test has long since been found unworkable. Were it otherwise, the common law, unaided by commission, state or national, would have sufficiently regulated rates. When each jury arrived at a different result, it was seen that this process was useless as a uniform or definite test; that a single conclusion (that of a commission) must be substituted for the diverse conclusions of many. This means, of course, that the reasonableness of any given rate is at best a guess. We must still employ that process in dealing with individual rates; but when we are dealing with rates in the aggregate—with the revenue considerations necessary to sustain the agencies of transportation it would be irrational, even fatuous, to employ the inch measure of individual rates. That is counsels' continuing and egregious error. They decline to deal with rates in the aggregate although that is exactly what section

15a deals with—paragraphs (2), (3) and (4) as well as (5) and (6). They are apparently willing to deal with rates in the aggregate in getting the rate level tentatively established but are unwilling to continue the process to the logical result worked out in paragraphs (5) and (6).

For a generation counsel for the railroads proceeded with their unit or inch measure theory and brought the railroads to the brink of disaster. Thoroughly alarmed, the main body of security holders urged Congress to adopt a revenue test and to extend responsibility for applying it to the Commission. The net effect of counsels' argument is to force rate making and rate adjustments away from revenue considerations as the underlying test to the outworn and impracticable process which came near destroying these properties.

It is several generations too late to complain of testing the reasonableness of rates as a whole by testing the result (Proposition XIII, *supra*). We therefore attach no importance to the dictum in the *Cotting Case* or the other authorities to the same effect cited by counsel (8 App. Cas. 723, etc.). Equally unjustified is the contention that the test of actual results is so arbitrary as to amount to a denial of due process (*id.* p. 66). We confess that we can not regard as seriously intended any such assertion.

Counsel asserts that rates cannot be increased, if reasonable in and of themselves, merely because they are not compensatory (*id.* 68). That suggestion begs the question—and drops back to the consideration of individual rates, a subject with

which section 15a does not deal. It is, moreover, misleading. We have shown that reasonable rates from the public standpoint are generally speaking those rates which the public would have to pay to reproduce the same services (*Brunswick, etc. District v. Maine Water Co., supra*)—bearing in mind here, of course, that section 15a is dealing with the service rendered by a national system of transportation conducted by competitive units. Rates would certainly be unreasonable to the carriers which failed to enable the agencies themselves to survive—under honest and efficient management; and section 15a asserts that proposition as the statutory policy of the United States.

One of the stubbornly asserted criticisms of the opponents of this process is that “if rates are unreasonable they have always been recoverable” and that “they are, and always have been, unlawful exactions in so far as they exceed what is reasonable” (*id.* p. 53). That observation is neither logical nor correct in that it confuses the two applications of the term “reasonable” as applied to the making of rates for competitive systems under a national scheme. We have elsewhere pointed out that it may be reasonable for the shipper to pay a uniform rate in order to sustain competitive service that may yet be actually unreasonable for particular carriers in the group to receive. It is, as we have shown, clearly reasonable for the shipper to pay that which is necessary to sustain the competitive agencies of transportation even if it is *loaded* as proposed by section 15a to accomplish that result. But that is very dif-

ferent from the question as to what is reasonable for the carrier to receive for the service. Since a rate may be closed as to the shipper and left open as to the government (*Keogh v. C. & N. W.*, *supra*), it is entirely proper that the latter process should be employed to avoid either of the consequences which would follow if its opponents should prevail. Either the public by patronizing the competitor with the lower rate structure would dry up its parallel or competing line, or excessive revenue would be permitted to the lines with denser traffic. The latter result would be a constant impediment to fair rate structures.

A number of cases are cited (*id.* 70-74, 80-82) by opponents in support of the well settled proposition that in establishing competitive rates the rate making authority is accustomed to give consideration to the entire competitive situation and does not base the rate necessarily on the line having the shortest haul or most favorable operating conditions or densest traffic. That is good public policy—necessary to sustain competitive line. Obviously the shipper can not complain. We have shown that his rights are not primary but derivative, as a member of the general public. (Propositions XVIII and XI.) That rate making policy ~~that~~ is very different from a contention advanced by the line of shortest route, or lowest operating cost or densest traffic, that is *has a constitutional right* to have a rate made on a competitive or group basis rather than on another basis justified by the cost of the service to it.

As for the contention that the question of “rea-

sonable rates" must depend primarily upon the reasonableness to the shipper of each rate for the individual service involved (*id.* 67, 74), it is clear that we are tendered a standard which is wholly impracticable of application or assistance in the adjustment of general rate levels for a national railway system. More and more steadily has the rate making authority passed from the effort to analyze each rate in and of itself. An examination of the reports of the Interstate Commerce Commission discloses that the question of rate making, in detail as in the adjustment of the general rate level to changes in the cost of transportation has resolved itself into a process of relations, comparisons and adjustments of inequalities, checked finally and in the aggregate by net railway operating income.

We have several times referred to the sound doctrine stated in *Brunswick, etc. Dist. v. Maine Water Co.*, that in general and subject to the proposition that the public should pay something for the risk of capital which it avoids, a reasonable charge for any given public service is that which it would cost the public itself to reproduce the service. In this case the service is the actual service performed *plus a stand-by service* rendered by the competitor. It is inequitable for the carrier rendering the service to retain the stand-by charge where the total is in excess of the cost and a reasonable profit to that particular carrier; stated otherwise, a shipper has available two or more routes, uses only one, and pays for the privilege. That is inherent in the public policy of inviting

and sustaining a great national system made up of competitive units.

Opponents persistently decline to recognize this distinction between a rate which may be reasonable for the shipper to pay and one which may be reasonable for the carrier to retain (*id.*, 79-80.) The assertion is made by counsel (*id.*, 85, *et seq.*) that the right of the government to regulate the charges for the use of properties impressed with a public trust rests upon the theory that without such regulation the owner may exact from individual patrons unreasonably high rates. That may be truly stated as an expression of the common law right which passed to the states, but it is not a correct statement of the power of Congress under the Commerce Clause, which was plenary in the sense that Congress was authorized to make such regulations as are necessary to preserve and protect interstate commerce and its agencies on a wholesome basis, and all interstate carrier properties are acquired subject to that condition. That power is clearly broader than the mere rate making power inherent in local authority. It is quite conceivable, under the theory for which the opponents of this statute contend (that is, that Congress may not regulate differential advantages inherent in location, or in low cost of construction or of operation or density of traffic) that railroads exceptionally located might become a menace, by virtue of their exceptional situation, to the existence of all other essential agencies of transportation. We do not find it necessary to take the position that such predominating influence might

invest such carrier with noxious consequences in the sense that it might be considered in the class of hurtful agencies which may be excluded from commerce altogether, but it is not to be doubted that the power of Congress under the Commerce Clause on such a premise is broader than mere authority to try and ascertain whether or not the rates and fares charged to the public by this agency were exorbitant. We believe that the Commerce Clause can reach the carrier itself whose assertion of competitive advantage endows it with qualities which menace the agencies of transportation as a whole.

We note again the persistent refusal of the opponents of this process (*id.*, p. 89 *et seq.*) to distinguish between the establishment of individual rates which are just and reasonable in relation to other rates and are proper for the shipper to pay—especially to sustain the competitive agencies of transportation—and the conditions which Congress may attach to the receipt of those rates by carriers for whom they produce an excessive return. Having repeatedly conceded (*id.*, p. 89, *etc.*) that paragraphs (2), (3) and (4) constitute proper regulation of commerce and that one of the objectives was to get a rate level “*which would produce revenue adequate to sustain the average roads and probably better the former condition of the weak roads of the group,*” counsel illogically assert that ~~the objection of~~ paragraphs (5) and (6) had as their object a third and entirely distinct object: “namely, to prevent the better-than-average carrier of a group from retaining

net income realized from the rates prescribed under the new rule of rate making in excess of the rate of return fixed by the Act" and that this third object cannot be said to be accomplished by a regulation of commerce in that the net income arises after the act of commerce has been completed. To reach this narrow and tenuous conclusion counsel deny the validity of the integral nature of the process proclaimed in terms by the statute (*id.*, p. 89, 90).

In conclusion, we restate our belief that the rejection of the provisions of section 15a now under attack would make imminent or assured the restoration of the old, unsatisfactory and destructive basis of rate making, withdraw the provisions placing transportation on a truly national basis, and destroy the revenue considerations which have protected these systems and now protect them from serious consequences.

Respectfully submitted,

JOHN G. MILBURN,
FORNEY JOHNSTON,

Of Counsel.

November, 1923.



APPENDIX

As part of the literature dealing with the theory and constitutionality of Section 15a are to be noted the recent article by Charles W. Bunn, Esq., entitled "The Recapitulation of Earnings Provisions of the Transportation Act," Yale Law Journal, January, 1923; the article by the writer of this brief entitled "The Transportation Act, 1920," in the Virginia Law Review, April, 1920; also his testimony before the Senate Committee on Interstate Commerce, November 23, 1921, in the hearings on S. 1150 and S. 2510 (Modification of Transportation Act, 1920), p. 475 et seq.

Among the notable expressions of able lawyers at the time of final consideration of the legislation before Congress are to be mentioned the following, sufficiently indicating the fundamental necessity for this legislation and the soundness of its economic and constitutional theory.

EXCERPT FROM SPECIAL ARTICLE ON TRANSPORTATION ACT (SENATE BILL), BY HON. WM. H. TAFT, THE PUBLIC LEDGER, PHILADELPHIA, PA., JANUARY 15, 1920.

"The problem which Senator Cummins has sought to solve is how uniform and reasonable rates may be fixed for the various railroads of the country so as to enable all of them to live and to prevent any of them from enjoying excessive dividends. To fix rates so low as directly to keep the dividends of certain railroads within reason would create impossible deficits for others in competition. The weaker railroads are necessary to the regions which they serve and must be maintained. If private operation is to continue, how can the matter be adjusted? Senator Cummins' method is to divide the country into rate districts in which conditions are similar, to ascertain the value of all the railroads within the district and then to fix rates at such a level that the net return for the use of the properties shall be $5\frac{1}{2}$ per cent on their value, with half a per cent more to be used by the railroads in nondividend-producing improvements. Any railroad earning more than

this is to divide the surplus, up to 7 per cent, equally with the Government; its half a per cent to be put in a reserve fund and the Government's half a per cent to be used to create a railway contingent fund. Should the revenue of any railroad exceed 7 per cent, one-fourth of that excess is to go into the Railway Reserve Fund and three-fourths into a Government Railway Contingent Fund. After the reserve fund of the railroad shall have reached and is maintained at 5 per cent of the value of its capital, the division of the excess over 6 per cent between the railroad and the Government is one-third to the railroad for such uses as it chooses and two-thirds to the Government Railway Contingent Fund.

* * *

"The merits of the Senate bill are that it furnishes a reasonable standard for the action of the Interstate Commerce Commission in fixing rates. It requires primarily the fixing of rates enabling the railway companies of the country to live and to pay a reasonable income on their property. With that as a fundamental rule, the rest of the problem will work itself out, because the change will restore confidence in railway properties as an investment. The deplorable phase of the present situation has been the impossibility of securing capital to make needed new construction.

"The 5½ per cent standard of rates has been called a guaranty, and has attracted criticism and objection. Shippers and certain groups of the interested public are not content to give up their fancied advantage in the present unsatisfactory system by which railroads are made to work for insufficient pay. Such a result in the end works against the shipper, because it reduces the possibility of adequate facilities and injures the whole railway service. But he cannot be made to see this. Five and one-half per cent on a value fixed by the Commission itself, after the fullest investigations, is not an excessive rate.

"On the other hand, objection comes from the successful railroad companies that this is not enough for them. They object that it is confis-

cation to take away from them an excess over 6 per cent and compel them to divide that excess with the Government, and, therefore, it is unconstitutional. The police power which may be exercised in the regulation of the rates charged by the railroads is ample for the purpose. It is not limited to any particular method by which those rates and the revenues from them shall be kept within reason. Rates may be fixed directly or they may be fixed with reference to the dividends which they bring, so that when the railroad actually receives its net revenue it becomes a trustee of the receipts until the fair return may be determined. It is only rate fixing after all."

EXCERPT FROM PAPER BY WALKER D. HINES, ESQ., DIRECTOR GENERAL OF RAILROADS, BEFORE ASSOCIATION OF THE BAR OF NEW YORK, JANUARY 7, 1920.

"First, I believe that there will not be a prompt and liberal treatment of rate questions until profits clearly in excess of a fair return are appropriated in part to the public interest.

"As an illustration, I have in mind one important railroad company whose railroad, even in this difficult year, will earn over 140 per cent of the standard return, and this company has in the past paid high dividends and in addition has had a large annual surplus. When the railroad companies apply for an increase in rates it will inevitably be urged that an increase ought not to be granted which would still further increase the large profits of this company. For example, an increase of 20 per cent in the freight rates of this company would give it a net operating income more than twice the standard return assuming that it continued to enjoy the same business. I have no doubt that such a prospect would stimulate the most persistent opposition to the increase and the result might be that an increase seriously needed by other companies would be defeated simply because the giving of the increase would yield what would be regarded as a grossly excessive profit for this favored company. I see no way to meet such a situation except to provide for a

division of the excess over a clearly reasonable return. Of course, enough of the excess should be given to the company to stimulate efficiency in operation, but beyond that point the fact that the company would get the excess would be a serious obstruction to the railroads in general getting an increase to which on the average they might be entitled. The excess thus appropriated for the public interest should be largely placed in reserves so as to protect the general railroad situation in unfavorable years. Such a course would quiet agitation, would stabilize the situation, and without it I believe it would be impossible to get prompt and liberal treatment of any rate increase question."

EXCERPT FROM PAPER BY HON. C. A. PROUTY, DIRECTOR,
BUREAU OF VALUATION, INTERSTATE COMMERCE COM-
MISSION, BOSTON, MASS., FEBRUARY 2, 1920.

"As I see it, it is this uncertainty more than everything else which has demoralized railroad credit, and if that is right such credit can only be restored by removing the uncertainty. In some way the Government must determine, first, the value of the property of each carrier upon which a fair return shall be allowed and, second, that rate of return.

* * * * *

"Having clearly stated the amount of return to which these carriers are entitled, the next thing is to devise a way in which such rates can be established as will yield that return and no more. This plainly must be by instructing the Interstate Commerce Commission to establish proper rates for that purpose and give the Commission the necessary authority to do so.

"The difficulty of this problem is comprehended in the three words above underscored, and no more. The rate must yield the carrier enough or it cannot function; it must not yield too much or the public is unjustly burdened. If the Interstate Commerce Commission were given, as it should be, the fullest authority over the making of rates and divisions, it would still find itself beset with certain practical difficul-

ties as to which it must have the aid of legislative enactment. These difficulties would be of two general classes, arising, first, from the competitive situation, and, second, from the fact that net earnings cannot be accurately forecast and must vary from year to year.

"The railroads of this country in a given section are generally competitive; that is, they must charge the same rate. But the application of that rate upon all the railroads in the competitive territory produces widely divergent results. Road AB earns a return of 20 per cent upon its value, and road XY only 3 per cent.

* * * * *

"The owners of this railroad have devoted its property to the public service. They are entitled to a fair return upon the value of that property and no more. Twenty per cent is manifestly an utterly extravagant return. This road has no vested right to prey upon the community which it serves. It is the duty of the Government, not to single out that particular road and appropriate its property, but to provide by general enactment that the net earnings of no railroad shall exceed what is reasonable. It may do this by fixing the rates which the road may charge, or by fixing the net income which it may earn, or by combining the two processes. The provisions of the Cummins Bill would allow this railroad an earning of between 9 and 10 per cent upon its value, which certainly is most munificent to those stockholders and not un-American unless it be un-American to restrain the rapacity of wealth.

"What shall be done with the surplus seems to me immaterial. It should be covered into the United States Treasury and appropriated for any proper purpose. What shall be done for the weak road, I am not now considering. That road under the proposed legislation would be vastly better off in the future than it has been in the past, although it will probably require additional assistance.

"The second embarrassment under which the Commission would act arises out of the fact that it is impossible to accurately forecast the

net earnings which will be produced from year to year under any given scale of rates.

* * * * *

"It has always seemed to me that if in any year the earnings of a particular carrier exceeded the amount to which it was entitled under the declaration of Congress, then the surplus should be put into a fund to be held for the payment of future interest and dividends in those years when its earnings did not equal the amount prescribed.

* * * * *

"The foregoing principles are embodied in the Cummins Bill. For many years I have been an advocate of these ideas and it is extremely gratifying that they have at last found favor with the Senate committee which has given this whole subject the most painstaking and intelligent consideration. Personally, I believe that Section 6 is more important than any other item in the pending legislation, for I do not believe that private operation can be permanently successful without some plan of this sort."

EXCESS EARNINGS OF RAILROADS

LETTER FROM
THE CHAIRMAN OF THE INTERSTATE
COMMERCE COMMISSION

TRANSMITTING

IN RESPONSE TO A SENATE RESOLUTION OF
DECEMBER 15, 1922, INFORMATION RELATIVE
TO THE DETERMINATION AND RECOVERY OF
EXCESS RAILWAY OPERATING INCOME



DECEMBER 27 (calendar day, DECEMBER 30), 1922.—Referred
to the Committee on Interstate Commerce

WASHINGTON
GOVERNMENT PRINTING OFFICE

1923

tion 19a of the act. Such valuations, however, date back from four to eight years and have not as yet been brought up to the periods affected by the statute. This will involve considerable accounting and engineering work in connection with the checking up of additions and retirements.

The limited appropriations for the valuation of carriers have during the last two years forced us to choose between the curtailment of our activities in fixing and issuing tentative valuations as of specific dates of valuation or deferring the work of bringing valuations up to date. We adopted the latter alternative. The bringing of valuations up to date is, however, receiving active attention. We now have men in the field and in the Washington office engaged in bringing up to date the valuations of some 40 carriers whose returns indicate that their earnings may be subject to the recapture provisions of section 15a. Due to lack of sufficient appropriation in the present fiscal year, this work is limited to the class of carriers named. Progress in this vital work in the fiscal year 1923-24 is contingent upon the appropriation which may be granted by Congress for valuation work. The estimate of \$1,000,000 recommended by the Bureau of the Budget does not include any allowance for bringing valuations up to date or investigations for the ascertainment of basic values for recapture purposes. Our representatives have explained to the House Committee on Appropriation the need of restoring our original estimate of \$1,280,000, which includes \$180,000 for policing returns made by carriers to our Valuation Order No. 3, dealing with additions, betterments, and retirements since the initial date of valuation fixed separately for each carrier, and for utilizing these returns in bringing valuations up to date.

Information concerning those railroads whose properties we have tentatively valued is contained in Exhibit B. The value of railway property as ascertained by the commission stated in this exhibit is in each case the tentative value as of the date shown, ascertained under section 19a.

No class 1 railroad has paid any excess earnings to the commission. Three class 1 railroads reported excess earnings, namely:

The Buffalo & Susquehanna Corporation, the Detroit & Toledo Shore Line, the Lehigh & New England Railroad Co.

These roads are included in Exhibit B.

(3) All other Class I railroads which, from any reports made to the commission, annual, monthly, or otherwise, appear to have received in excess of 6 per cent upon the value of their railway property; the value of such property of each found or approximately determined as aforesaid; and the excess earnings of each computed according to such value, or the nearest approximate estimate of the same which can be readily reported.

All Class I carriers have been included under paragraph (2), and there is therefore nothing additional to report under this paragraph.

(4) Each railroad other than a Class I railroad that has reported any excess earnings to the commission under section 15a; the value of the railway property of each, as claimed by it; the excess earnings admitted by it; the value of the railway property of each such railroad as found or determined by the commission as aforesaid; the excess earnings of each such railroad as computed on such value so found or determined by the commission; and the amount of excess earnings paid by each such railroad to the commission.

Twenty-six other than Class I railroads reported excess earnings, and are listed in Exhibit C. What has been said in paragraph (2)

relative to the ascertainment of the value of railway property is applicable here also.

(5) The aggregate of excess earnings which remain payable to the commission from all railroads, according to the provisions of said section 15a, as computed by the commission, or the nearest approximation or estimate thereof, which the commission can readily report; and the items which make up the aggregate to the extent that the same have been separately computed or estimated.

No information is available other than that shown in Exhibits B and C.

(6) Whether any railroad which has failed or refused to make any report as to excess earnings required by such rules and regulations as the commission may have prescribed, or to pay over one-half of such excess earnings in accordance with the provisions of said section 15a, has made any statement of its grounds or reasons for such failure or refusal; and, if so, the name of each such railroad with a copy of such portion of such statement as sets out such grounds or reasons.

All Class I railroads have made reports in response to our orders as to their excess earnings, although many have done so under protest. While the matter of furnishing reports is still the subject of correspondence with a few other than Class I carriers, no carrier has refused to make such report. In Exhibit D, attached hereto, the name of each railroad which has failed or refused to pay to the United States one-half of the excess earnings reported by it is shown, and the grounds or reasons given by each for such failure or refusal are stated.

(7) As to any railroad or railroads appearing to have received in trust for the United States excess earnings which remain payable to the commission, according to the provisions of said section 15a, the steps or proceedings taken or begun by the commission to enforce payment of the public moneys so unlawfully retained.

The provisions of the law bearing upon the enforcement of section 15a and the orders of the commission thereunder have been carefully studied by our legal advisers with a view to the institution of proper legal proceedings against delinquent carriers. A number of cases have been examined in this connection but no suits have been instituted by us.

The Dayton-Goose Creek Railway Co., by bill filed in the District Court of the United States for the Eastern District of Texas, on December 6, 1922, in Dayton-Goose Creek Railway Co. v. The United States of America et al., Equity No. 262, has applied for an injunction to restrain the enforcement of our orders referred to in paragraph (1) of this report, as directed against that carrier. This application is set for hearing at New Orleans, La., on Thursday, January 25, 1923, at 10 o'clock a. m. It is understood that the principal purpose of this proceeding is to test the constitutionality of the so-called recapitulation provisions of section 15a of the act.

(8) That the commission report the amount of the value of each of the railroads in each State, respectively, so far as the same has been compiled.

Up to the present time we have not undertaken to segregate by States the single sum value of interstate carriers. We have listed and shown separately by States in the tentative valuation reports thus far served the property of carriers with a fixed situs therein together with the cost of reproduction new and cost of reproduction less depreciation, except in the case of lands where present value is shown. We have not, however, allocated to States the general items of equipment, materials and supplies, working capital, or other elements of

value without a fixed situs in any one State. In assembling data upon which the value of a given carrier as a whole is based, we have collected the basic material from which information as to the values separately by States can be compiled. This is an activity for which no allowance is made in our valuation appropriation recommended by the Bureau of Budget for the next fiscal year and transmitted to Congress. The recommended appropriation, we specifically understand, does not provide for any undeveloped work. Except, therefore, for the inventories and elements of value above enumerated the information called for is not at this time available.

C. C. McCHORD, *Chairman.*

EXHIBIT A.

[Interstate Commerce Commission, Washington.]

ORDER.

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 16th day of January, A. D. 1922. In the matter of the recovery and payment of excess railway operating income under the provisions of section 15a of the interstate commerce act.

The commission having under consideration the provisions of paragraphs (6) and (9) of section 15a of the interstate commerce act, reading as follows:

"(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the commission in the manner provided in paragraph (4).

"(9) The commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The commission shall make proper adjustments to provide for the computation of excess income for a portion of the year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective."

It is ordered:

1. That the years or parts of years for which net railway operating income and the return represented by such income upon the aggregate value of railway property held for and used in the service of transportation are to be computed shall be the years or parts of years ending on December 31, respectively. In the case of any carrier which accepted the provisions of section 209 of the transportation act, 1920, the first period for which such computations are to be made shall be September 1, 1920, to December 31, 1920, both inclusive. In the case of carriers which did not accept the provisions of said section 209 of the transportation act, 1920, the first period for which such computations are to be made shall be March 1 1920, to December 31, 1920, both inclusive.

2. That the excess income for the portions of a year ended December 31, 1920, shall be preliminarily fixed as the income in excess of such proportions of 6 per cent on the value of the railway property held for and used in the service of transportation

as the net railway operating income for the months of September to December, both inclusive, or for the months of March to December, both inclusive, as the case may be, in the three years ended June 30, 1917, bears to the total net railway operating income for the same three years.

3. The aggregate value of the railway property of the reporting carrier or carriers held for and used in the service of transportation shall be based preliminarily, in the case of carriers which made such returns directly or indirectly, upon the amount reported or used by such carrier or carriers as the aggregate value of railway property held for and used by them in the service of transportation in the proceeding entitled "in the matter of the applications of carriers in official, southern, and western classification territories for authority to increase rates," Docket No. Ex Parte 74, with adjustments for—

- (a) New lines, extensions and additions, and betterments;
- (b) Retirements;
- (c) Amounts of property for which permission to retain earnings under paragraph (b) of section 15a of the interstate commerce act has been granted; and
- (d) Other increases or decreases,

properly affecting the aggregate value of the railway property of such carriers held for and used in the service of transportation, claimed or reported by the carrier and supported by detailed explanations. The value of such railway property, as reported, will be corrected, and the actual value will be determined in the manner provided in paragraph (4) of section 15a of the interstate commerce act, and corresponding adjustments in amounts recoverable by and payable to the commission will be effected. In the case of those carriers which did not directly or indirectly make returns in connection with Ex Parte 74, the investment in road and equipment as of December 31, 1919, with proper adjustments as hereinabove indicated will be used for preliminary computations, and these preliminary computations will be similarly corrected after the determination of actual values in accordance with paragraph (4) of section 15a of the interstate commerce act.

4. The establishment of preliminary bases for prorating the return of 6 per cent, or ascertaining property values to which the rate is applicable, does not preclude any carrier from using such other bases as it considers more equitable and in accord with the facts; such other bases, however, must be fully and properly supported.

It is further ordered, That pursuant to the foregoing rules and regulations for the determination and recovery of the excess income payable under section 15a of the interstate commerce act each and every carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the provisions of the interstate commerce act, excluding—

- (a) Sleeping-car companies and express companies;
- (b) Street or suburban electric railways unless operated as a part of a general steam railroad system of transportation;
- (c) Interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight; and
- (d) Any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof, shall on or before February 1, 1922, report to the Secretary of the Interstate Commerce Commission, Washington, D. C., the following matters:

1. The amount by which its net railway operating income for the period ended December 31, 1920, was in excess of that percentage of the value of railway property held for and used by it in the service of transportation, established by the foregoing rules, with explanation and details of the manner in which such excess income was computed, or, in the event there was no such excess railway operating income, that fact, with corresponding calculations and details in support of the return.

2. In cases where excess-net railway operating income is reported, a statement of the title of the fund account in which one-half of such excess was placed, when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held.

3. The amount of the remaining one-half of the excess income as preliminarily computed paid to the Interstate Commerce Commission and when and how such amount was paid. If unpaid, the amount should be paid by remittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, secretary of the Interstate Commerce Commission, Washington, D. C.

4. The value of the railway property of the reporting carrier or carriers with a statement in detail of the manner in which such value is arrived at and a full explanation as to the method in which the values of properties of a group of carriers have been aggregated in cases where property values and income are computed for a system pursuant to the provisions of paragraph (6) of section 15a of the interstate commerce

act. In such cases a full explanation should be given of the reasons why the group of carriers used are treated as under common control, management, and operation.

It is further ordered, That an original report and three copies of the same shall be forwarded to George B. McGinty, secretary, Interstate Commerce Commission, Washington, D. C. Reports shall be prepared in typewritten or printed form, on paper approximately 8½ by 11 inches, with 1½ inches margin at the left side for binding, except as to exhibits, which may be of any convenient size, but which shall be folded to conform to the size of the report.

It is further ordered, That the original reports shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

By the commission, division 4:

[SEAL.]

GEORGE B. MCGINTY, Secretary.

[Interstate Commerce Commission, Washington.]

ORDER.

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 16th day of March, A. D. 1922. In the matter of the recovery and payment of excess railway operating income under the provisions of section 15a of the interstate commerce act for the year ended December 31, 1921.

The commission having under consideration the provisions of paragraph (6) of section 15a of the interstate commerce act, reading as follows:

"(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the commission in the manner provided in paragraph (4)."

It is ordered, That pursuant to the rules and regulations for the determination and recovery of the excess income payable under section 15a of the interstate commerce act, as defined in our order of January 16, 1922, modified as may be necessary in the case of each respondent for the year ended December 31, 1921, each and every carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the provisions of the interstate commerce act, excluding—

- (a) Sleeping car companies and express companies;
- (b) Street or suburban electric railways unless operated as a part of a general steam railroad system of transportation;
- (c) Interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight; and
- (d) Any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof, shall on or before May 1, 1922, report to the secretary of the Interstate Commerce Commission, Washington, D. C., the following matters:

1. The amount by which its net railway operating income as defined in paragraph (1) of section 15a of the interstate commerce act, for the year ended December 31, 1921, was in excess of 6 per cent of the value of the railway property held for and used by it in the service of transportation, with explanation and details of the manner in which such excess income was computed, or, in the event there was no such excess railway operating income, that fact, with corresponding calculations and details in support of the return.

2. Where it reports excess net railway operating income, the title of the fund account in which one-half of such excess was placed, the date when such reserve fund was

established, the amount placed in that fund, and how the assets in that fund are represented or held; and the amount of the remaining one-half of the excess income, as preliminarily computed, paid to the Interstate Commerce Commission and when and how such amount was paid. If the latter amount is unpaid, it should be paid by remittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, secretary of the Interstate Commerce Commission, Washington, D. C.

3. The value of such railway property used in earning the income reported for the year ended December 31, 1921, with a statement in detail of the manner in which such value is arrived at and showing the ownership and a general description of such railway property.

4. The foregoing requirements of this order are made subject to the following proviso, that in cases where two or more of said carriers constitute a group under common control and management and operated as a single system, as provided in paragraph (6) above quoted, the foregoing matters shall be reported for the system as a whole, irrespective of the separate ownership and accounting returns of the various parts of such system, but shall also be reported in so far as practicable for each part of the system, and full explanation shall be made as to the method in which the value of properties of a group of carriers have been aggregated and the reasons why the group of carriers used are treated as under common control, management, and operation.

It is further ordered, That an original report and three copies of the same shall be forwarded to George B. McGinty, secretary, Interstate Commerce Commission, Washington, D. C. Report shall be prepared in typewritten or printed form, on paper approximately 8½ by 11 inches, with 1½ inches margin at the left side for binding, except as to exhibits, which may be of any convenient size, but which shall be folded to conform to the size of the report.

It is further ordered, That the original reports shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

By the commission, division 4:

[SEAL.]

GEORGE B. MCGINTY, Secretary.

EXHIBIT B.

Class I carriers.

Carrier or groups of carriers comprising a single system, as provided in paragraph (6) of section 15a.	Value of railway property claimed by carrier.		Excess earnings reported by carrier.	Value of railway property used by the commission in its tentative valuation under section 19a.		Excess earnings computed according to tentative valuation as of valuation date given.
	Period ended Dec. 31, 1920.	Year ended Dec. 31, 1921.		Date of valuation, June 30—	Amount. ¹	
Ann Arbor R. R. Co.	\$19,123,546	\$19,373,342	0	1915	\$11,127,277	\$68,119
Manistique & Lake Superior R. R. Co.	1,497,948	1,502,240	0	1915	686,444	1,305
Total system.....	20,621,494	20,875,582	.....	.....	11,813,721	69,424
Athens, Birmingham & Atlantic Ry. Co.	40,935,935	40,021,568	0	1914	25,630,000	.....
Baigor & Aroostook R. R. Co.	30,837,768	31,363,400	0	1916	25,350,084	50,975
Bingham & Garfield Ry. Co.	7,190,647	7,182,065	0	1916	5,896,443	.....
Boston & Maine R. R.	245,250,895	237,392,297	0	1914	234,189,816	.....
Vermont Valley R. R. Co.	.....	2,101,822	0	1914	2,450,000	.....
Sullivan County R. R. Co.	.....	1,421,552	0	1914	2,100,000	.....
York Harbor & Beach R. R. Co.	.....	334,335	0	1914	407,843	.....
St. Johnsbury & Lake Champlain R. R. Co.	.....	4,132,574	0	1916	2,924,120	.....
Montpelier & Wells River R. R. Co.	.....	1,370,537	0	1914	1,925,000	.....
Total system.....	245,250,895	246,753,117	.....	.....	243,906,779	.....

¹ These figures do not include additions and betterments, retirements, or other changes in property since valuation date.

EXCESS EARNINGS OF RAILROADS.

Class I carriers—Continued.

Carrier or groups of carriers comprising a single system, as provided in paragraph (6) of section 15a.	Value of railway property claimed by carrier.		Excess earnings reported by carrier.	Value of railway property used by the commission in its tentative valuation under section 19a.		Excess earnings computed according to tentative valuation as of valuation date given.
	Period ended Dec. 31, 1920.	Year ended Dec. 31, 1921.		Date of valuation, June 30—	Amount.	
Buffalo & Susquehanna R. R. Corporation.	\$15,550,741	\$15,504,923	\$15,906			
Central Vermont Ry. Co.	22,184,322	22,166,416	0	1917	\$22,065,787	
Charleston & Western Carolina Ry. Co.	9,920,289	9,830,092	0	1915	10,509,027	
Augusta & Summerville R. R. Co.		65,532	0	1916	79,671	
Total system.	9,920,289	9,895,624			10,588,698	
Chicago & Eastern Illinois Ry. Co.	91,323,655	89,430,163	0	1915	69,206,753	\$334,775
Chicago, Indianapolis & Louisville Ry. Co.	47,738,810	47,404,572	0	1915	31,495,358	
Chicago, Rock Island & Pacific Ry. Co. (system)	401,263,327	403,331,832	0	1915	335,490,263	
Copper Range R. R. Co.	7,957,302	7,955,753	0	1916	4,610,000	
Delaware & Hudson Co. (system)	118,970,386	123,903,200	0	1916	98,728,801	1,698,824
Detroit & Toledo Shore Line R. R. Co.	6,371,404	6,358,789	150,914			
Duluth, South Shore & Atlantic Ry. Co.	48,545,384	47,901,376	0	1916	17,967,191	
Elgin, Joliet & Eastern Ry. Co.	74,387,466	73,526,059	0	1914	39,049,163	1,289,388
Florida East Coast Ry. Co.	51,654,010	52,856,039	0	1916	47,640,143	
Georgia R. R., lessee organization	14,167,264	14,194,838	0	1916	17,521,976	
Georgia Southern & Florida Ry. Co.	14,815,335	14,587,105	0	1915	9,860,191	
Green Bay & Western R. R. Co. (system)	42,720,333	12,720,333	0	1916	7,264,183	
Gulf & Ship Island R. R. Co.	14,470,327	14,515,364	0	1916	9,036,302	
Central of Georgia Ry. Co.	95,821,423	95,684,345	0	1915	81,872,841	
Kansas City Southern Ry. Co. (system)	105,160,780	105,702,368	0	1914	49,445,907	1,899,823
Lake Superior & Ishpeming Ry. Co. (system)						
Lehigh & New England R. R. Co. (system)	18,966,882	18,671,407	0	1916	7,913,267	241,268
Louisiana Ry. & Navigation Co.	17,554,689	17,464,153	24,508			
	21,670,780	21,982,211	0	1917	10,796,479	
Maine Central R. R. Co.	64,364,206	64,709,688	0	1916	61,091,384	
Portland Terminal Co.	6,914,976	7,199,409	0	1916	8,096,704	
Sandy River & Rangely Lakes R. R.	1,288,223	1,285,681	0	1916	1,359,427	
Bridgton & Saco River R. R. Co.	300,990	304,434		1916	360,563	
Total system.	72,874,395	73,499,272			70,906,078	
Mineral Range R. R. Co.	3,514,800	3,283,147	0	1916	3,879,195	
Minneapolis, St. Paul & Sault Ste. Marie.	195,950,785	205,578,762	0	1916	111,945,828	
Mobile & Ohio R. R. Co.	56,408,487	53,797,941	0	1915	44,462,449	
Nevada Northern Ry. Co.	3,688,730	3,213,096	0	1917	5,325,532	
New Orleans, Great Northern R. R. Co.	16,314,886	16,559,849	0	1916	7,201,388	
New York, New Haven & Hartford R. R. Co.	439,998,432	441,336,414	0	1915	382,797,066	
Central New England Ry. Co.	28,666,905	28,490,286	0	1916	22,589,129	
Total system.	468,665,337	469,832,700			405,386,195	
New York, Ontario & Western Ry. Co.	95,053,287	95,654,057	0	1916	45,051,370	
Norfolk Southern R. R. Co.	34,092,267	34,596,872	0	1914	24,063,840	
Northern Alabama Ry. Co.	5,024,787	4,800,755	0	1916	5,189,429	
Pere Marquette Ry. Co.	122,421,766	125,773,813	0	1915	63,300,242	600,090
Rutland R. R. Co.	25,766,266	25,590,298	0	1916	22,205,821	
St. Louis Southwestern Ry. Co. (system)	108,065,792	137,000,000	0	1915	56,714,295	3,010,173
Spokane International Ry. Co.	5,648,110	5,802,407	0	1917	5,330,039	
Toledo, St. Louis & Western R. R. Co.	43,854,362	44,323,317	0	1916	17,326,263	642,430
Trinity & Brazos Valley Ry. Co.	11,548,533	11,691,061	0	1916	9,064,566	
Ulster & Delaware R. R. Co.	7,941,892	8,202,701	0	1916	6,472,889	
Virginian Ry. Co. (system)	115,824,370	118,347,726	0	1916	55,862,622	2,312,642
Western Pacific R. R. Co.	93,780,246	93,200,543	0	1914	66,730,011	

Excess earnings paid to the commission, none.

EXCESS EARNINGS OF RAILROADS.

9

Class I carriers whose returns do not show any excess earnings based on valuations claimed and in connection with which no tentative valuation has been made under section 15a.

Carrier, or groups of carriers comprising a single system as provided in paragraph (6) of section 15a.	Value of railway property claimed by carrier.	
	Period ended Dec. 31, 1920.	Year ended Dec. 31, 1921.
Alabama & Vicksburg Ry. Co.	\$6,398,112.75	\$6,669,673.19
Louisiana & Mississippi R. R. & Trans. Co.	387,842.00	462,921.75
Vicksburg, Shreveport & Pacific Ry. Co.	10,007,160.00	10,343,785.56
Total system.	16,793,114.75	17,496,380.41
Atchison, Topeka & Santa Fe Ry. (system).	838,092,061.00	873,468,696.00
Atlanta & West Point R. R. Co.	5,503,510.00	5,402,796.00
Atlantic Coast Line R. R. Co.	214,530,440.00	239,388,143.00
Baltimore & Ohio R. R. Co.	697,624,867.00	707,032,851.00
Staten Island Rapid Transit Ry. Co.	9,278,410.00	9,351,052.00
Baltimore & Ohio, Chicago Terminal R. R. Co.	40,415,018.00	40,426,818.00
Sandy Valley & Elkhorn Ry. Co.	5,355,342.00	5,370,045.00
Long Fork Ry. Co.	2,728,171.00	2,832,896.00
Miller's Creek R. R. Co.	184,784.00	182,613.00
Morgantown & Kingwood R. R. Co.	5,364,169.00	5,272,807.00
Hamilton Belt Ry. Co.	96,937.00	96,937.00
Total system.	760,547,678.00	770,615,709.00
Bessemer & Lake Erie R. R. Co.	93,890,432.00	91,628,423.00
Buffalo, Rochester & Pittsburgh Ry. Co.	98,824,554.00	97,780,748.00
Carolina, Clinchfield & Ohio Ry.	64,631,291.00	64,912,636.00
Carolina, Clinchfield & Ohio Ry. of South Carolina.	3,104,849.00	3,105,696.00
Total system.	67,786,140.00	68,018,331.00
Central R. R. Co. of New Jersey.	154,502,265.00	160,000,324.00
Eastern & Western R. R.	188,158.00	189,822.00
New York & Long Branch R. R. Co.	5,564,377.00	5,701,067.00
Total system.	160,254,800.00	165,891,213.00
Chesapeake & Ohio Ry. Co.	312,539,750.00	324,200,313.00
Chicago & Alton R. R. Co.	139,203,026.00	143,880,763.00
Chicago & Northwestern Ry. Co.	458,672,566.00	467,985,778.00
Chicago, St. Paul, Minneapolis & Omaha.	87,307,812.00	88,200,838.00
St. Louis & Bridge Co.	944,316.00	947,867.00
Total system.	546,924,694.00	557,134,483.00
Chicago, Burlington & Quincy R. R. Co. (system).	528,104,640.00	539,932,197.00
Chicago Great Western R. R. Co.	135,058,882.00	134,714,957.00
Chicago, Milwaukee & St. Paul Ry. Co.	675,715,982.00	689,840,070.00
Chicago, Peoria & St. Louis R. R. Co.	8,003,293.00	8,029,325.00
Cincinnati, Indianapolis & Western R. R. Co.	15,461,432.00	14,708,418.00
Colorado & Southern Ry. Co. (system).	119,579,962.00	120,686,452.00
Colorado & Wyoming Ry. Co.	3,926,054.00	3,904,163.00
Delaware, Lackawanna & Western R. R. Co. (system).	255,757,118.00	258,279,370.00
Denver & Rio Grande Western R. R. Co.	190,632,600.00	191,198,332.00
Denver & Salt Lake R. R. Co.	12,794,509.00	12,995,408.00
Northwestern Terminal Ry. Co.	4,703,606.00	4,703,606.00
Total system.	17,498,115.00	17,699,014.00
Detroit & Mackinac Ry. Co.	7,312,752.00	7,572,004.00
Detroit, Toledo & Ironton R. R. Co.	26,229,620.00	25,275,803.00
Duluth & Iron Range R. R. Co.	70,248,453.00	70,744,075.00
Duluth, Massabe & Northern Ry. Co.	118,302,566.00	120,477,511.00
Duluth, Winnipeg & Pacific Ry. Co.	14,683,744.00	13,679,638.00
El Paso & Southwestern Co.	56,521,914.00	56,688,257.00
El Paso R. R. Co. (system).	465,706,940.00	468,903,229.00
Fort Smith & Western R. R.	12,075,374.00	12,446,854.00
Georgia & Florida Ry.	16,504,285.00	16,648,752.00

EXCESS EARNINGS OF RAILROADS.

Class I carriers whose returns do not show any excess earnings based on valuations claimed and in connection with which no tentative valuation has been made under section 19a—
Continued.

Carrier, or groups of carriers comprising a single system as provided in paragraph (6) of section 15a.	Value of railway property claimed by carrier.	
	Period ended Dec. 31, 1920.	Year ended Dec. 31, 1921.
Grand Trunk Railway System:		
Atlantic & St. Lawrence R. R. Co.	\$12,178,658.00	\$13,186,778.00
Champlain & St. Lawrence R. R.	72,746.00	94,405.00
Chicago, Detroit & Canada Grand Trunk, Junction R. R. Co.	5,798,209.00	5,933,331.00
Cincinnati, Saginaw & Mackinaw R. R. Co.	1,913,977.00	2,042,735.00
Bay City Terminal Ry. Co., Milwaukee, Detroit & Grand Haven Ry. Co.	8,021,318.00	8,829,612.00
Detroit & Huron Ry. Co.	287,708.00	281,668.00
Grand Trunk Milwaukee Car Ferry Co.	570,856.00	578,767.00
Grand Trunk Western Ry. Co.	33,203,667.00	37,757,053.00
Pontiac, Oxford & Northern R. R.	1,411,150.00	1,588,787.00
Toledo, Saginaw & Muskegon Ry. Co.	3,232,810.00	3,235,017.00
Michigan Air Line Ry.	1,860,344.00	1,954,228.00
St. Clair Tunnel Co.	3,751,045.00	3,757,571.00
United States & Canada R. R. Co.	706,152.00	709,988.00
Total system	73,041,640.00	79,979,347.00
Great Northern Ry. Co. system	495,050,845.00	496,177,738.00
Gulf coast lines:		
New Orleans, Texas & Mexico Ry. Co.	17,085,041.00	18,540,962.00
Beaumont, South Lake & Western Ry. Co.	3,232,358.00	3,284,835.00
Orange & Northwestern R. R. Co.	1,231,590.00	1,245,530.00
St. Louis, Brownsville & Mexico Ry. Co.	16,879,481.00	16,852,223.00
New Iberia & Northern R. R. Co.	2,945,255.00	3,002,658.00
Louisiana Southern Ry. Co.	1,530,138.00	1,542,006.00
San Benito & Rio Grande Valley Ry. Co.	1,085,956.00	1,086,278.00
Brownsville & Matamoros Bridge Co.	393,434.00	394,822.00
Houston Belt & Terminal R. R. Co.	2,508,708.00	2,505,944.00
Total system	46,891,991.00	48,464,286.00
Gulf, Mobile & Northern R. R. Co.	24,796,307.00	25,340,178.00
Hocking Valley Ry. Co.	59,610,023.00	59,226,214.00
Illinois Central R. R. Co. system	472,754,832.00	489,700,894.00
International & Great Northern Ry.	45,798,362.00	45,481,322.00
International Ry. Co. of Maine	8,435,037.00	8,474,665.00
Kansas City, Mexico & Orient R. R. Co.	23,721,957.00	22,986,198.00
Kansas City, Mexico & Orient Ry. Co. of Texas	7,111,074.00	6,986,821.00
Total system	30,833,031.00	29,973,019.00
Kansas, Oklahoma & Gulf Ry. Co. system	12,593,619.00	20,470,854.00
Lehigh & Hudson River Ry. Co.	7,113,735.00	8,632,904.00
Lehigh Valley R. R. Co.	232,099,108.00	234,005,083.00
Louisiana & Arkansas Ry. Co.	11,778,554.00	12,272,137.00
Louisville & Nashville R. R. Co.	331,450,408.00	336,922,126.00
Louisville, Henderson & St. Louis Ry. Co.	8,667,405.00	8,701,940.00
Midland Valley R. R. Co.	19,400,556.00	19,732,985.00
Minneapolis & St. Louis R. R. Co.	64,881,820.00	65,297,906.00
Minnesota & International Ry. Co.	3,734,546.00	3,725,995.00
Mississippi Central R. R. Co.	8,315,404.00	8,640,006.00
Missouri & North Arkansas R. R. Co.	18,403,960.00	18,467,014.00
Missouri, Kansas & Texas Ry.	191,185,716.00	193,309,001.00
Missouri, Kansas & Texas Ry. of Texas	76,757,305.00	77,072,553.00
Wichita Falls & Northwestern Ry.	7,530,541.00	7,536,858.00
Total system	275,473,562.00	277,938,406.00
Missouri Pacific R. R. Co.	387,900,672.00	393,594,541.00
Arkansas Central R. R. Co.	733,162.00	794,415.00
Coal Belt Electric Ry.	500,077.00	533,645.00
Union Ry. Co.	2,048,089.00	2,089,991.00
Natchez & Southern Ry.	302,929.00	305,372.00
Total system	391,484,929.00	397,117,968.00
Monongahela Ry. Co.	17,188,268.00	17,302,398.00
Montour R. R. Co.	7,983,367.00	7,950,517.00
Nashville, Chattanooga & St. Louis Ry. system	88,593,041.00	90,294,090.00
New Jersey & New York R. R. Co.	3,522,900.00	3,343,548.00
New York Central R. R. Co. system	1,748,372,217.00	1,803,220,597.00
New York, Chicago & St. Louis R. R. Co.	76,294,885.00	78,069,988.00

EXCESS EARNINGS OF RAILROADS.

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Class I carriers whose returns do not show any excess earnings based on valuations claimed and in connection with which no tentative valuation has been made under section 19a—Continued.

Carrier, or groups of carriers comprising a single system as provided in paragraph (6) of section 15a.	Value of railway property claimed by carrier.	
	Period ended Dec. 31, 1920.	Year ended Dec. 31, 1921.
New York, Susquehanna & Western R. R. Co.	\$38,601,230.00	\$38,652,288.00
Wilkes-Barre & Eastern R. R.	6,000,000.00	6,000,000.00
Macopin R. R. Co.	104,000.00	104,000.00
Susquehanna Connecting R. R.	500,000.00	500,000.00
Hackensack & Lodi R. R. Co.	8,661.00	8,651.00
Lodi Branch R. R. Co.	12,000.00	12,000.00
Total system.	45,225,891.00	45,276,934.00
Norfolk & Western Ry. Co. system.	347,374,243.00	351,900,286.00
Northern Pacific Ry. Co. system.	532,160,634.00	544,535,034.00
Northwestern Pacific R. R. Co.	68,476,467.00	68,354,987.00
Pennsylvania R. R. Co. system.	2,190,461,900.00	2,196,875,259.00
Philadelphia & Reading Ry. Co. system.	263,140,563.00	264,724,950.00
Pittsburg & Shawmut R. R. Co.	13,636,073.00	13,676,958.00
Pittsburg & West Virginia Ry. Co. system.	38,558,045.00	39,511,636.00
Pittsburg & Shawmut Northern R. R. Co.	27,114,789.00	28,808,300.00
Quincy, Omaha & Kansas City R. R. Co.	6,240,476.00	6,292,649.00
Richmond, Fredericksburg & Potomac R. R. Co. system.	31,753,255.00	33,137,000.00
St. Louis-San Francisco Ry. Co.	358,329,016.00	381,633,106.00
West Tulsa Belt Ry.	62,954.00	63,232.00
Birmingham Belt R. R.	1,463,082.00	1,467,643.00
Paris & Great Northern R. R.	1,076,222.00	1,062,802.00
St. Louis, San Francisco & Texas Ry.	3,159,442.00	3,548,884.00
Fort Worth & Rio Grande Ry.	7,536,530.00	7,906,571.00
Brownwood North & South Ry.	288,217.00	288,502.00
Kansas City, Clinton & Springfield Ry.	5,110,275.00	5,152,703.00
Quannah, Acme & Pacific Ry.	1,990,675.00	1,995,809.00
Total system.	378,990,419.00	403,119,317.00
San Antonio & Aransas Pass Ry. Co.	25,422,039.00	25,401,922.00
San Antonio, Uvalde & Gulf R. R.	5,056,550.00	5,250,030.00
Seaboard Air Line Ry. Co.	200,198,652.00	199,590,957.00
Macon, Dublin & Savannah R. R. Co.	3,784,204.00	3,794,206.00
Savannah & Statesboro Ry. Co.	499,404.00	500,239.00
Raleigh & Charleston R. R. Co.	1,117,592.00	1,117,581.00
Marion & Southern R. R. Co.	324,747.00	324,517.00
Chesterfield & Lancaster R. R. Co.	788,065.00	787,385.00
Charlotte, Monroe & Columbia R. R. Co.	116,485.00	116,808.00
Tampa Northern R. R. Co.	1,961,348.00	1,969,807.00
Tampa & Gulf Coast R. R. Co.	1,075,577.00	1,136,036.00
East & West Coast Ry.	786,061.00	788,195.00
Florida Central & Gulf Ry.	788,000.00	794,518.00
Tampa Union Station Co.	256,950.00	256,950.00
Total system.	211,097,145.00	211,186,280.00
Southern Ry. Co.	565,862,153	560,239,833
Alabama Great Southern R. R. Co.	30,379,295	29,974,796
Cincinnati, New Orleans & Texas Pacific Ry. Co.	58,959,173	59,537,485
New Orleans & Northeastern R. R. Co., New Orleans Terminal Co.	35,993,113	34,853,135
Total system.	691,193,734	684,605,349
Northern Pacific Co. system.	1,065,597,462	1,066,831,431
Spokane, Portland & Seattle Ry. Co.	62,666,165	62,568,664
Oregon Trunk Ry.	16,463,267	16,452,076
Oregon Electric Ry. Co.	13,424,015	13,329,486
United Railways Co.	6,280,709	6,300,748
Total system.	98,834,156	98,650,904
Tennessee Central R. R. Co.	19,845,711	19,862,017
Texas & Pacific Ry. Co.	131,204,286	131,119,730
Texas, Georgia & Western Ry. Co.	9,824,677	9,731,262
Union Pacific R. R. Co. system.	688,308,178	790,381,175
Utah Ry. Co.	16,180,621	16,397,961
Utah Ry. Co. system.	220,046,181	221,759,531
Western Maryland Ry. Co.	131,706,720	137,124,298
Western Railway of Alabama	8,964,838	7,094,875
Winning & Lake Erie Ry. Co.	86,063,651	87,400,788

EXCESS EARNINGS OF RAILROADS.

EXHIBIT C.

Other than class I carriers.

Carrier or group of carriers comprising a single system, as provided in paragraph (6) of section 15a.	Value of railway property claimed by carrier.		Excess earnings reported by carrier.	Value of railway property used by the commission in its tentative valuation under section 19a.		Excess earnings computed according to tentative valuation as of valuation date given.	Amount of excess earnings paid to the commission.
	Period ended Dec. 31, 1920.	Period ended Dec. 31, 1921.		Date of valuation June 30—	Amount ¹		
Batesville Southwestern R. R. Co....	\$347,497	\$382,630	\$13,668	.....	.....	.....	\$7,979.00
Bauxite & Northern Ry. Co.....	100,462	100,462	15,958	.....	.....	.....	.....
Brimstone R. R. & Canal Co.....	811,585	811,585	11,549	1918	\$245,486	\$62,529	5,774.73
Campbell's Creek R. R. Co.....	219,181	212,445	13,167	.....	.....	.....	.....
Chicago & Illinois Midland Ry. Co....	4,464,713	4,462,911	86,587	.....	.....	.....	.....
Cisco & Northeastern Ry. Co.....	1,211,088	1,357,074	14,762	.....	.....	.....	.....
Cornwall R. R. Co.....	1,425,739	1,597,677	85,478	.....	.....	.....	.....
Dayton-Goose Creek Ry. Co.....	581,595	699,503	55,433	.....	.....	.....	.....
Detroit Terminal R. R. Co.....	2,571,012	2,602,315	214,524	.....	.....	.....	.....
East Jersey R. R. & Terminal Co....	1,245,796	1,171,833	72,884	1916	475,890	114,701	.....
Fort Worth Belt Ry. Co.....	419,818	910,092	32,866	.....	.....	.....	.....
Genesee & Wyoming R. R. Co.....	1,364,406	1,454,992	203,319	.....	.....	.....	.....
Goshen Valley R. R. Co.....	513,281	513,281	4,813	.....	.....	.....	.....
Gulf & Sabine River R. R. Co.....	.....	359,027	15,702	.....	.....	.....	.....
Ironton R. R. Co.....	3,133,484	3,349,278	30,520	.....	.....	.....	15,238.95
Kinston Carolina R. R.....	218,077	217,979	125	1914	160,841	3,555	.....
Laurinburg & Southern R. R. Co....	698,120	437,694	5,036	.....	.....	.....	2,518.23
Ligonier Valley R. R. Co.....	1,000,000	1,041,560	69,660	.....	.....	.....	.....
Shreveport, Alex. & S. W. Ry. (system).....	873,400	856,789	66,448	.....	.....	.....	.....
St. Joseph Belt Ry. Co.....	914,831	914,694	1,371	.....	.....	.....	685.72
Tionesta Valley Ry. Co.....	572,433	573,303	37,707	.....	.....	.....	.....
Tuckerton R. R. Co.....	514,782	518,777	1,130	1916	503,946	2,020	564.84
Unity Railways Co.....	417,780	421,478	1,842	.....	.....	.....	920.86
Warren & Ouachita Valley Ry. Co....	317,697	316,000	14,679	.....	.....	.....	7,339.26
Warrenton R. R. Co.....	74,039	74,539	3,818	.....	.....	.....	1,909.15
West Virginia Northern R. R. Co....	124,946	174,161	3,596	.....	.....	.....	.....

¹ These figures do not include additions and betterments, retirements, or other changes in property since valuation date.

EXHIBIT D.

Name of carrier.	Excess earnings reported.		Grounds or reasons given by carrier for its failure or refusal to pay over to the commission one-half of the excess earnings reported by it.
	For period ended Dec. 31.	Amount.	
Batesville Southwestern R. R. Co.	1921	\$13,668.00	<p>• • • We are not remitting, however, 50 per cent of the amount in excess of the net amount, as provided by the act of Congress, for the following reasons:</p> <p>First. The Batesville Southwestern Railroad is advised that said act of Congress, known as section 15a, paragraph 6, of the interstate commerce act, is unconstitutional and void, and for this reason does not fix a legal liability against the railroad.</p> <p>Second: The Batesville Southwestern Railroad was not operated by the Government during Federal control, and the act of Congress above referred to only applied to railroads operated under Federal control.</p> <p>Third. That the Batesville Southwestern Railroad did not avail of the guaranty provided under the transportation act.</p>

EXCESS EARNINGS OF RAILROADS.

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EXHIBIT D—Continued.

Name of carrier.	Excess earnings reported.		Grounds or reasons given by carrier for its failure or refusal to pay over to the commission one-half of the excess earnings reported by it.
	For period ended Dec. 31.	Amount.	
Buffalo & Susquehanna Railroad Corporation.	1920	\$18,905.98	(1) The amount by which the respondent's net railway operating income for the period of four months ended Dec. 31, 1920, was in excess of the proportion for that period of 6 per cent on the value of railway property held for and used by it in the service of transportation was \$18,905.98, as shown by Exhibit A attached. The Interstate Commerce Commission not having prescribed percentages of depreciation which shall be charged on fixed improvements in accordance with the provisions of section 435 of the transportation act, 1920, no deductions have been made for depreciation other than on equipment, in computing the net railway operating income for the period, but necessarily in computing the net railway operating income for that period due allowance will have to be made for depreciation. The Interstate Commerce Commission has adopted a rule prescribing the amount allowable under the guaranty for the six months immediately preceding the four last months of the year. If the commission shall determine that the expenditures for maintenance during the guaranty period were in excess of the amount allowable for that six months, it necessarily follows that any excess over the amount so fixed would have to be considered an expenditure made in the last four months; so that for the two periods the respondent shall receive credit for the actual amount of expenditures for the 10 months of operation by it. It follows that until the allowance for the guaranty period shall have been settled this return must be considered as tentative and not binding on the respondent.
Campbell's Creek R. R. Co.	1921	13,166.80	(2) For the reasons above stated and for other reasons which may involve the validity of the recapture provisions and order, no reserve fund has been created and no remittance has been made to the commission of any part of the net railway operating income of the four last months of 1920. We are advised by counsel that said provision (section 15a) of the interstate commerce act is unconstitutional, null, and void. Our counsel advises us that Hon. Charles E. Hughes gave an opinion to the same effect. We are, however, involuntarily and under protest giving you a financial statement as follows: * * * Involuntarily and under protest we have placed one-half of said excess to a general reserve account, and the same has been used in the current operating expenses of the railroad. We have not remitted said one-half of the excess income because, as advised by counsel, the law providing for such payment is unconstitutional, null, and void.
Chicago & Illinois Midland Ry. Co.	1921 1920	1,028.68 152,716.02	Beg to advise that these returns will be subject to correction * * * due to the fact that we had 250 gondola cars rebuilt in 1920, costing \$339,960.52. None of this amount was charged out in 1920 but the entire amount was put into a suspense account. We have asked permission to adjust our operating expenses for the year 1920 by adding thereto \$100,000, same being that year's proportion of the expense, and also to adjust correspondingly our 1921 figures.
Chgo & Northeastern Ry. Co.	1921	14,762.11	(No grounds or reasons given.)
Cornwall R. R. Co.	1920	85,478.33	Do.
Dayton-Goose Creek Ry. Co.	1920 1921	21,666.24 33,766.90	Now comes Dayton-Goose Creek Ry. Co., hereinafter called "carrier," and, in compliance with the commission's order of Jan. 16, 1922, in the matter of the recovery and payment of excess railway operating income under the provisions of section 15a of the interstate commerce act, files herewith a report of income and earnings and of the other matters referred to in said order, but the carrier states: (1) That said report is not filed voluntarily, but by compulsion and under protest, and for the sole purpose of avoiding prosecutions and possible penalties. (2) That this commission has no lawful or constitutional right to require the carrier to make or file said report for the purposes set out in said order.

EXCESS EARNINGS OF RAILROADS.

EXHIBIT D—Continued.

Name of carrier.	Excess earnings reported.		Grounds or reasons given by carrier for its failure or refusal to pay over to the commission one-half of the excess earnings reported by it.
	For period ended Dec. 31.	Amount.	
Dayton-Goose Creek Ry. Co.—Contd.	.....	.....	<p>(3) That so much of the transportation act, 1920, amending the interstate commerce act, as purports to require the carrier to give up or to pay over to this commission any part of the carrier's earnings or income is unconstitutional and void, for that the enforcement of so much of said act against the carrier would deprive it of its property without due process of law and take its property for public use without just compensation, in contravention of the fifth amendment of the Constitution of the United States.</p> <p>(4) That said order of the commission, of date Jan. 11, 1922, because based and wholly predicated upon section 15a of the interstate commerce act which was added thereto by section 422 of the said transportation act, 1920, is likewise unconstitutional and void for that the enforcement of that portion of said order requiring the carrier to pay over to this commission any part of its earnings or income, would deprive the carrier of its property without due process of law and take its property for public use without just compensation, in contravention of the fifth amendment to the Constitution of the United States.</p> <p>(5) The carrier protests against the accuracy of the preliminary bases prescribed in and by said order of the commission, and all rights are expressly reserved to the carrier to object to any conclusions which may be reached by the commission upon the report filed herewith, and to any report or order made thereon or in connection therewith, and to contest in all proper and legal ways the enforcement of any order based upon said report or any part thereof, or upon said bases prescribed by the commission, and to so contest all efforts of the commission and of the United States of America to require the carrier to pay over to the commission or to any other persons whomsoever, without its consent, any portion of the carrier's earnings, income money, or property.</p> <p>(No ground or reasons given.)</p>
Detroit & Toledo Shore Line R. R. Co.	1920	\$150,914.13	<p>The carrier has not established a reserve fund under the provisions of paragraph (6) of section 15a, because it has not been determined for the period in question that it had any excess net railway operating income within the meaning of said section. Whether or not there was such net railway operating income can be determined only after the commission has ascertained the value of the railway property of the carrier held for and used in the services of transportation.</p> <p>The value (within the meaning of section 15a of the act) of the railway property held for and used by Detroit Terminal R. R. Co. in the service of transportation is not known by the carrier or by the deponent, the same being required to be fixed by the commission in the manner provided in paragraph (4) of said section. The deponent believes that such value should be fixed at an amount greatly in excess of the amount hereinbefore set forth under "1" based on property investment figures or "book values" in accordance with the commission's order.</p> <p>The carrier by its counsel states that the proprietary interest, the Tidewater Oil Co., and its subsidiary, the Tidewater Oil Sales Corporation, intend filing complaint to recover alleged unreasonable freight charges exacted from them; that such complaints will exceed in amount the excess income reported; and that, inasmuch as no substantial defense could be made to such complaints, it is willing to consent to reparation. "In such circumstances," carrier's counsel urges, "I believe that if section 15a were held to apply to the situation, nevertheless, it would be invalid from the point of view that since the act renders carriers amenable to shippers for reparation for unreasonable charges, the result would be to require the carrier to repay the excess to the shipper and also one-half of it into the commission's fund."</p> <p>At the time returns were filed, the requirement was protested on the ground that the section is unconstitutional in any event, and this contention is not waived by the foregoing argument. But it is believed that even if the section might be construed to be constitutional in some cases, it would be inapplicable in the instant case.</p>
Detroit Terminal R. R. Co.	1920	18,749.64	
	1921	195,775.36	
East Jersey Railroad & Terminal Co.	1921	72,884.90	

EXCESS EARNINGS OF RAILROADS.

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EXHIBIT D—Continued.

Name of carrier.	Excess earnings reported.		Grounds or reasons given by carrier for its failure or refusal to pay over to the commission one-half of the excess earnings reported by it.
	For period ended Dec. 31.	Amount.	
Port Worth Belt Ry. Co.	1921	\$32,866.26	(No grounds or reasons given.)
Genesee & Wyoming R. R. Co.	1920	93,091.16	That tentative report is filed under protest. In filing the same, the Genesee & Wyoming R. R. Co. does not admit the constitutionality of section 15a of the interstate commerce act, or acknowledge the authority of the Interstate Commerce Commission to require the filing of this report under the provisions of section 15a of the interstate commerce act. On the contrary, it denies the constitutionality of section 15a of the interstate commerce act, and it further denies that the provisions of that section authorized the Interstate Commerce Commission to issue its order of Jan. 16, 1922, as amended Feb. 4, 1922, or to require the filing of this report.
	1921	110,288.12	
Goshen Valley R. R. Co.	1920	4,430.88	Referring to your letter of Dec. 6, directed to Orson P. Rume, auditor of Goshen Valley R. R. Co., the matter has come to my attention as attorney for the company, and I beg to remind you of the return made Nov. 16, 1922, wherein you are advised as to the cost of the railroad and its earnings, and wherein you are advised that this company obligated itself upon its formation to pay 7 per cent interest on the advances made for its construction. This contract was made before the law went into effect by which you seek to require us to pay over the excess of 64 per cent. We decline to be bound by this law in the face of our contract to the contrary. You are, therefore, advised that I have advised the company that it is not bound to perform, as directed by you, nor to make the payments directed by you.
	1921	382.34	
Gulf & Sabine River R. R. Co.	1921	15,702.35	Comes now the Gulf & Sabine River R. R. Co., a Louisiana corporation with its domicile at Fullerton, in Vernon Parish, La., and respectfully represents: That it alleges the illegality of the order of division 4 of your honorable commission of date Jan. 16, 1922, which order was issued in the matter of the recovery and payment of excess railway operating income under the provisions of section 15a of the interstate commerce act, because said order, in its effect, will deprive appearer of its property without due process of law and is thus violative of the Constitution of the United States. That in making the report required by the order above referred to, appearer does not admit the legality of said order, but, on the contrary, denies the same and now specially protests against the requirements that such report be made in any form whatsoever. Now, in the event it should be finally determined that section 15a of said act and the above-mentioned order issued thereunder are legal and binding, then, in the alternative, appearer protests against the making of the report required by said order in the form required and especially protests against the method required by said order to be used in arriving at or computing the profits to be reported in such reports, because such method does not and will not disclose the true profits, nor permit the setting aside of surplus which may be earned in good business years to absorb the losses which accrue in years of business depressions. That interest on bonded and other indebtedness and other fixed necessary charges are as much items of expense as any other operating expense and the denial of permission to deduct from the profits such interest and fixed charges will work an irreparable injury to appearer, is unjust and unreasonable and will deprive it of its property without due process of law. Wherefore, appearer prays that this protest be filed and, upon consideration, that said order be recalled in whole, and, in the alternative, that the requirements thereof be amended so as to permit appearer, in computing its net earnings or profits, to deduct therefrom the amount of interest and other fixed charges which it is required to pay.
Eastern Carolina R. R. Co.	1921	126.53	(No grounds or reasons given.)

STATE OF NEW YORK

IN SENATE

January 1, 1901.

REPORT OF THE

COMMISSIONER OF THE LAND OFFICE

FILED

NOV 26 1923

WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM

NO. 330

DAYTON-GOOSE CREEK RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, *et al.*,
Appellees.

BRIEF OF APPELLANT FILED IN REPLY TO BRIEF OF
NATIONAL ASSOCIATION OF OWNERS OF RAIL-
ROAD SECURITIES.

FRANK ANDREWS,
ROBERT J. CARY,
ROBERT H. KELLEY,
F. C. NICODEMUS, JR.,
Solicitors for Appellant.

ANDREWS, STREETMAN, LOGUE & MOBLEY,
of Counsel.

IN THE
SUPREME COURT OF THE UNITED
STATES

October Term, 1923.

No. 330

DAYTON-GOOSE CREEK RAILWAY COMPANY, Appellant, <i>vs.</i> THE UNITED STATES OF AMERICA, <i>et al.</i> , Appellees.	}
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APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT OF TEXAS.

**BRIEF ON BEHALF OF APPELLANT IN REPLY
TO THE AMICUS CURIAE BRIEF FILED BY
THE NATIONAL ASSOCIATION OF OWNERS
OF RAILROAD SECURITIES.**

Statement.

At the opening of the argument of this appeal this Court granted to the National Association of Owners of Railroad Securities leave to file a brief as *amicus curiae* in support of the constitutionality of the income-appropriation provisions of Section 15a of the Interstate Commerce Act as amended by the Transportation Act, 1920.

From the formal application of the Association for leave to file its brief it appears that the membership of the Association "includes the owners of a very large proportion of the securities of the American railways—probably in excess of 50% principal amount of the entire funded indebtedness of the Class 1 railways of the United States."

Passing note may be made of the fact that this Association thus appears to be interested in the Transportation Act as representing the owners of funded indebtedness of Class 1 railways rather than as representing stockholders. It developed upon one of the hearings before the Senate Committee on Interstate Commerce that the Association represents various life insurance companies, savings banks, national and state banks, trust companies, casualty and surety companies, trust estates, universities and other holders of investment securities, and that it was organized for the purpose of giving representation in the discussion of railroad problems and railroad policies to bondholders who have no voice in the corporate management of the carriers and that it has not solicited stockholders for membership. *

It is apparent from the character of the Association's membership that its attitude respecting the reaction of the income-appropriation provisions of Section 15a upon the affairs of the rail carriers develops through a relation distinct from and in a measure opposed to the interest of the stockholders.

*Hearing before Senate Committee on Interstate Commerce, 67th Congress, First Session, under Senate Resolution 23, Vol. 2, pages 824; 847; 848.

Inasmuch as the Association admits responsibility for "the economic and legal theory of the present rate-making provisions of the Transportation Act, including the excess earnings clause," and attributes the enactment of this legislation to the arguments presented by its own counsel to the Newlands Committee in the fall of 1916, the brief which it now files in this Court commands attention.

We shall, therefore, avail of our privilege to file a brief in reply.

ARGUMENT.

I.

The interdependence between the rate-making provisions and the income-appropriation provisions of Section 15a sought to be established by the Association does not exist.

Throughout the brief of the Association the income-appropriation provisions of Section 15a are treated as an integral and necessarily interdependent part of the alleged rate-making scheme underlying the Transportation Act.

While the historical review and statement of economic conditions developed in the Association's brief undoubtedly disclose the necessity of a more liberal rate policy than antedated the Transportation Act, there is no warrant whatever for the assumption that the income-appropriation provisions are an indispensable part of the Act adopted in pursuance of such policy.

This is at once demonstrated when it is considered that subdivisions (2), (3) and (4) of Section 15a could be repealed without affecting the operation of subdivisions (5) and (6), while subdivisions (5) and (6) could be repealed without affecting the operation of subdivisions (2), (3) and (4).

Apart from this it appears from the brief of the Solicitor General that the question of the constitutionality of subdivisions (5) and (6) of Section 15a was a critical question in Congress, and that the *only* constitutional question seriously considered by Congress related to subdivisions (5) and (6). In the face of this Congress adopted Section 502, declaring that if any clause, sentence, paragraph or part of the Act shall for any reason be adjudged by any court to be invalid, such judgment shall not affect, impair or invalidate the remainder of the Act but shall be confined in its operation to the clause, sentence, paragraph or part of the Act directly involved in the controversy.

This furnishes an unconditional certificate of assurance that these provisions are not essentially interdependent and that the courts may pass judgment upon the income-appropriation provisions unaffected by any apprehension that a declaration of their invalidity as separable provisions of the Act would defeat the intent of Congress.

II.

The underlying vice of the argument in the brief of the Association lies in the assumption that legislative appropriation of private property is consistent with due process of law.

In replying to the argument advanced in the brief of the Association we shall not undertake to deal separately with the twenty-odd main propositions developed by its counsel with manifest care and industry.

Reducing the whole argument to a simple analysis, the Association rests upon one proposition, namely:

That by reason of the necessity of sustaining essential competitive agencies of transportation Congress has authorized and directed a uniform structure of rates in each rate group or rate territory, which rates as between the shipper and all carriers are conclusively presumed to be reasonable, but as between any individual carrier and the Government are conclusively presumed to be unreasonable if as the result of twelve months operation such carrier shall earn a net railway operating income in excess of the statutory maximum of 6% fixed by the Act, and that any income earned by such carrier in excess of such statutory maximum is not property protected by the Fifth Amendment.

Thus it is stated and reiterated throughout the brief that "Congress may foreclose the reasonableness and legality of a rate as to a shipper but leave the question open as to the Government" (Association's brief, pages 22, 33, 34, 96-97, 99-100).

The answer to this argument is threefold:

(a) The Association rests upon an erroneous assumption that as between the shipper and the carrier a judicial inquiry as to the reasonableness and legality of the rates producing the alleged excessive income has been foreclosed by Congress.

(b) The Association rests upon an erroneous assumption that Congress consistently, with due process of law, may as between the carrier and the Government foreclose a judicial inquiry as to the reasonableness of the carrier's rates by creating a *conclusive* presumption that rates producing a net railway operating income in excess of a fixed percentage of the value of the carrier's railway property are *pro tanto* unreasonable.

(c) The Association rests upon an erroneous assumption that Congress consistently, with due process of law, may foreclose a judicial inquiry as to the reasonableness of the rate of return which the carrier is permitted to earn upon its railway property.

We shall discuss these three propositions briefly in their order:

(a) *The Association rests upon an erroneous assumption that as between the shipper and the carrier a judicial inquiry as to the reasonableness and legality of the rates producing the alleged excessive income has been foreclosed.*

At the outset we challenge the basic proposition that a rate may be reasonable for the shipper to pay and unreasonable for the carrier to accept.

To state the proposition is to utter an obvious solecism.

The rate must be reasonable both as to the shipper and the carrier, or unreasonable both as to the shipper and the carrier; it cannot be reasonable as to one and unreasonable as to the other.

Moreover, we insist that every dollar which a carrier earns upon a reasonable schedule of rates is the carrier's private property and is protected as such by the Fifth Amendment.

If, however, it be assumed that "Congress may foreclose the reasonableness and legality of a rate as to a shipper but leave the question open as to the Government", if becomes pertinent to inquire whether it has done so by the Transportation Act, 1920.

Clearly it has not.

On the contrary, by subdivision (17) of Section 15a Congress has expressly preserved unimpaired the shipper's right of reparation for excessive charges, subject to the single condition that the shipper shall not be entitled to recover upon the sole ground that a particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission. That is to say, the fact that the carrier has earned excess income subject to appropriation under subdivisions (5) and (6) of Section 15a shall not be conclusive evidence that a particular rate is unreasonable and a recovery may not be had against the carrier upon that sole ground. If, however, evidence of the fact that excess income has been earned by the carrier is supplemented by even a scintilla of additional or extrinsic evidence, it may be held sufficient to establish the shipper's right to reparation.

Thus the carrier is exposed to the double jeopardy of (a) appropriation of excess income by the Government under subdivisions (5) and (6) of Section 15a, and (b) a claim by the shipper for reparation under subdivision (17) of Section 15a.

The Dayton-Goose Creek Company is peculiarly subject to this hazard. The bulk of its business is the transportation of crude and refined oil in interstate commerce under rates established by the Interstate Commerce Commission under subdivision (2) of Section 15a. It appears that there is now pending with the Interstate Commerce Commission, Docket No. 14122, a complaint by Lubright Refining Company in which reparation is sought to be recovered on account of the assessment and collection upon certain shipments of crude oil from Goose Creek, Texas, to East St. Louis, Illinois, which moved on dates between March 1, 1920, and December 31, 1921, on rates alleged to have been unjust, unreasonable, unlawful and excessive (Record 50-51). As the reparation claim of this one shipper amounts to \$1200.00 it is evident that if this claim is allowed and the carrier is called upon to respond to other shippers having like claims, it will be mulcted in an aggregate amount greatly exceeding the amount of its alleged excess income for the years 1920 and 1921.

The fact that the carrier's income is thus placed in jeopardy of double appropriation not only strikes at the foundation of the Association's argument but alone demonstrates that subdivisions (5) and (6) of Section 15a ignore the basic requirements of due process of law.

- (b) *The Association rests upon an erroneous assumption that Congress consistently, with due process of law, may as between the carrier and the Government foreclose a judicial inquiry as to the reasonableness of the carrier's rates by creating a conclusive presumption that rates producing a net railway operating income in excess of a fixed percentage of the value of the carrier's railway property are pro tanto unreasonable.*

In the opening paragraph of the brief filed by the Association its counsel characterizes Section 15a of the Transportation Act as an act "relating to the regulation or reduction of excess carrier income gratuitously and conditionally allowed the carrier, by requiring one-half of such excess, *when ascertained and defined in pursuance of due process* (our italics), to be paid into a general fund to be administered by the Commission as a by-product of effective rate regulation in the general public interest in transportation, and thus essentially in the interest of the shipping public which has paid the excess."

While at the very outset the Association thus admits that excess income is subject to appropriation only when its character as excess income has been "ascertained and defined in pursuance of due process," it assumes that a bald legislative declaration satisfies this fundamental constitutional requirement.

This is the precise point at which our arguments diverge.

We reiterate our conviction that the alleged excess income of the Railway Company cannot be taken away, either in whole or in part, on the

theory that it is excess income, without a judicial ascertainment and determination of that underlying fact.

Congress has no more right to say that railway operating income in excess of a fixed amount shall be conclusive evidence of excessive reward for transportation service or excessive rates for transportation service than it had to say that the courts in ascertaining the condemnation value of the Monongahela Bridge could not take into consideration the value of the Bridge Company's franchise.

As Mr. Justice Brewer said in the Monongahela case:*

"It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

By a line of decisions of this Court the Dayton-Goose Creek Company is entitled under the protection of due process to receive as compensation for its transportation service on each class of business the cost of that service plus a reasonable reward.**

If by reason of excessive rates or otherwise the Railway Company during the years 1920 and 1921

**Monongahela Navigation Company v. United States*, 148 U. S. 312; 327.

***Vandalia Railway Company v. Schnell*, 255 U. S. 139.
Northern Pacific Railway Company v. North Dakota, 236 U. S. 585.
Norfolk & Western Railway Company v. West Virginia, 231 U. S. 605.

has received for its transportation service more than a reasonable reward on each class of its business, it is, to the extent that such reward is excessive, liable to respond to shippers. This liability, as we have already shown, is expressly kept alive by subdivision (17) of Section 15a.

In any action or proceeding for reparation brought by a shipper under subdivision (17) the *sine qua non* of a recovery must be a judicial ascertainment and determination that the carrier's reward is unreasonable and excessive.

Certainly no one would contend that in such a case Congress consistently, with due process, could fetter the judiciary in its decision of such question by a binding pronouncement that a specified rate of return upon the value of the carrier's property shall be accepted as conclusive evidence that the carrier has received an unreasonable and excessive reward.

Much less can it do so when it seeks to make the United States the beneficiary of the alleged excessive reward and to cover it into the public Treasury.

Again we refer to and invoke the Monongahela Bridge case and respectfully submit that the right of Congress "to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution."

- (c) *The Association rests upon an erroneous assumption that Congress consistently, with due process of law, may foreclose a judicial inquiry as to the reasonableness of the rate of return which the carrier is permitted to earn upon its railway property.*

In the appendix of the brief of the Association reference is made to an article by Charles W. Bunn, Esq., appearing in the Yale Law Journal, January, 1923. In this article, which is quoted at page 47 of the Solicitor General's brief, Mr. Bunn says:

"If a carrier's rates may be made with reference to its prosperity lower than those of other carriers, and if no carrier can insist as an absolute legal right on receiving more than a fair return on the value of its property, it would seem that there can be no violation of the Constitution in the mere recapture of so-called earnings made after the act was on the statute books, provided that after the recapture the carrier is left with a reasonable return on the value of its property."

The statement that no carrier can insist as an absolute legal right on receiving more than a fair return on the value of its property runs counter to the decisions of this Court already cited holding that irrespective of the return on the value of the carrier's property it is entitled to receive cost plus a reasonable reward on each and every class of its business.

Apart, however, from this plain defect in his major premise Mr. Bunn, as well as counsel for the Association, clearly overlook the fact that Congress has no power under the Constitution to determine what shall constitute a fair return upon the value of railway property.

This question is non-legislative and essentially judicial.

Here again the statute invades the judicial function.

Subdivisions (5) and (6) of Section 15a clearly involve a legislative declaration that 6% shall constitute a just and reasonable return upon the value of railway property at all times, in all places and under all conditions. To permit Congress to enforce this declaration would undermine a principle of constitutional law which has stood unchallenged since the Granger cases were overruled by this Court in *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota*.*

As late as June 11, 1923, this Court asserting the judicial character of this question under the Constitution annulled a finding of a State Commission that 6% constituted a fair return upon the value of the property of a public utility located in the State of West Virginia.**

Under this decision it is manifest that many, if not all, of the carriers engaged in rail transportation are entitled to complain of the 6% return as confiscatory. It is true that the bill of complaint of the Dayton-Goose Creek Company does not allege specifically that the 6% return is confiscatory as to it. The bill does, however, allege that the income-appropriation clauses of Section 15a operate as "a taking of complainant's property for public use without just compensation and in truth and in fact without any compensation of any character whatsoever and without due process of law" (Record, page 8).

*134 U. S. 418.

***Bluefield Waterworks & Improvement Company v. Public Service Commission of the State of West Virginia, et al.*

The bill of complaint is accurately characterized in the brief of the Solicitor General as a proceeding "in the nature of a demurrer to Section 422 of the Transportation Act of 1920." Clearly, therefore, all questions as to the constitutionality of the statute *on its face* arise upon the Dayton-Goose Creek Company's bill, including the question as to the validity of the 6% return as applied to all carriers throughout the United States, because unless the 6% return can be held good as to all carriers it cannot be held good as to any carrier. To hold otherwise would produce intolerable inequalities.

To illustrate:

Carrier "A" owning a railway located in the State of Nebraska where 8% appears to be the minimum constitutional return*, actually earns 15%. This carrier alleges and proves that 6% is confiscatory as to it and as the result it must be permitted to retain the whole of its income amounting to 15%.

Carrier "B" owning a railway located in the State of New York where at one time 6% was held to be the proper rate of return for a public utility having a peculiarly favorable position**, actually earns 8%. This carrier alleges that the 6% return is confiscatory as to it, but fails to establish that fact and as the result is required to surrender 1% of its income to the United States.

It would be clearly inadmissible to attempt to avoid these inequalities by commencing the income-appropriation at the level of actual confis-

**Lincoln Gas & Electric Company v. Lincoln*, 250 U. S. 256.

***Wilcox v. Consolidated Gas Company*, 212 U. S. 19.

cation in the case of those carriers establishing a constitutional right to a return above 6%. The statute provides no machinery for such appropriation and to read into the statute a provision permitting it, would reconstruct it. Moreover, it appears by reference to subdivision (3) of Section 15a that the statute was drawn upon the theory that the level of confiscation is at a point below 6% and it is not, therefore, the purpose of Congress to commence income-appropriation at that exact level.

As we view it, there can be but one question, namely: Is the 6% return a constitutional and valid return as to every carrier in the United States? If this question is answered in the negative then we submit that these provisions of the statute must be declared unconstitutional.

Under existing economic conditions the 6% rate is clearly confiscatory as to many carriers, if not all carriers. We attach as an appendix a list of railroad stocks listed on the New York Stock Exchange showing the yield basis determined from quotations published November 2, 1923. It is highly significant that practically all of the common stocks on the list sell on higher interest bases than 6%. The common stock of the Union Pacific is upon a 7.68% basis; that of the Pennsylvania Railroad Company upon a 7.1% basis; that of the New York Central upon a 6.81% basis, and so throughout the list. With these prime railroad stocks selling on such bases is it conceivable that any carrier in a proper judicial inquiry would fail to condemn the 6% rate? However this may be, the fact that the statute fixes an inflexible rate applicable to all carriers and makes no provision for a judicial inquiry as to the reasonableness of the

rate so fixed must necessarily undermine the statute as contrary to the fundamental principles of due process of law.

The foregoing argument has proceeded upon the assumption that subdivisions (5) and (6) of Section 15a are a regulation of commerce.

This assumption is, however, one which cannot be indulged.

The true character of a statute must be determined by its actual and not its theoretical reaction; that is, by the test of phenomena that can be observed.

What, then, is observable under these provisions of the statute?

There is no observable reaction upon the transportation rates established under the Act. Rates remain the same regardless of the operation of the provisions for the appropriation of excess income.

There is no observable reaction upon interstate commerce, nor upon "the means by which commerce is carried on."* Regardless of these provisions the agencies of commerce operate precisely as before.

There is but one phenomenon which is observable and that is the reduction by direct appropriation of the income of carriers engaged in interstate commerce. That is to say, the statutory provisions here drawn into question limit income, a product of commerce, but do not regulate commerce itself. In actual operation, therefore, these contested provisions relate to a subject as to which Congress is destitute of regulatory power.

Nor can this conclusion be altered by calling

**Hammer v. Dagenhart*, 247 U. S. 251.

the appropriated income "a by-product of effective rate regulation" (Association's Brief, p. 2).

In his celebrated opinion in *Munn v. Illinois*** Chief Justice Waite points out the objects to which the regulatory power of government extends. He shows that in England from time immemorial and in this country from its first colonization it has been the practice, in order to protect the public from unreasonable and improper charges, to regulate the rates of ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers and a variety of other activities.

In all these services a uniform rate structure is just as important and just as essential as it is in the rail transportation service.

If, then, the income-appropriation provisions of the present Act are sustained on the legal and economic theory developed by the Association, it is obvious that the State of Illinois, putting into effect a uniform rate schedule applicable to the grain elevators which were before this Court in *Munn v. Illinois*, is at liberty to appropriate "as a by-product of effective rate regulation" all operating income of a particular elevator in excess of the level of actual confiscation. It is equally true that the income of every innkeeper in the State of New York above the level of plain confiscation is by like token subject to appropriation by the State of New York.

The fallacy of the legal and economic theory advanced in the brief of the Association is that counsel ignore the fact that the one purpose and object of governmental rate regulation is to protect the public against improper charges by securing just and reasonable rates and that when this

**94 U. S. 113.

is done the Government has performed its function and exhausted its power.

Whatever a rail carrier or grain elevator or innkeeper or any other servant of the public can earn under a system of rates so established by the proper governmental authority, is no more than a just and reasonable reward for its service and is private property protected by the Fifth Amendment.

All of which is respectfully submitted,

FRANK ANDREWS,
ROBERT J. CARY,
ROBERT H. KELLEY,
F. C. NICODEMUS, JR.,
Solicitors for Appellant.

ANDREWS, STREETMAN, LOGUE & MOBLEY,
Of Counsel.

APPENDIX

List of Railroad Stocks Listed on New York Exchange Showing Yield
Basis Determined from Quotations Published November 2, 1923.

	RATE	PRICE	YIELD
Atchison, Topeka & Santa Fe	6%	97	6.2%
Atchison, Topeka & Santa Fe Pfd.	5%	88	5.7%
Atlantic Coast	7%	112½	6.2%
Baltimore & Ohio	5%	58¾	8.½%
Baltimore & Ohio 4% Pfd.		58	6.9%
Buffalo, Rochester & Pitts.	5%	54	9.3%
Canadian Pacific	10%	147	6.7%
*Chesapeake & Ohio Com.	4%	73⅛	5.½%
Chesapeake & Ohio Pfd.	6½%	98½	6.6%
Colorado Southern Ry.	3%	19	15.8%
Colorado Southern 1st Pfd.	4%	49	8.1%
Colorado Southern 2nd. Pfd.	4%	35	11.4%
Chicago & Northwestern	5%	62	8.%
Chicago & Northwestern Pfd.	7%	104	6.7%
Chicago, R. I. & Pac. Pfd.	6%	66	9.%
Chicago, R. I. & Pac. Pfd.	7%	77	9.1%
C. C. C. & St. L.	4%	98½	4.06%
Delaware & Hudson Co.	9%	109¾	8.2%
Del. Lacka. & West.	12%	114⅞	10.4%
Great Northern Pfd.	5%	55⅞	8.94%
Ill. Cen.	7%	103¼	6.77%
Ill. Cen. Pfd.	6%	107¼	5.6%
Ill. Cen. Pfd. W. I.	6%	103½	5.8%
Ill. Cen. Leased Lines	4%	70½	5.6%
Kan. City Pfd.	4%	51½	7.7%
Lehigh Valley	3½%	61	5.¾%
Louisville & Nashville	5%	87	5.¾%
M. St. Paul S. S. M.	4%	50	8.%
N. Ore. T. & M.	7%	88½	7.9%
New York Central	7%	101½	6.81%

	RATE	PRICE	YIELD
New York C. & St. Louis Pfd.	6%	87 $\frac{3}{4}$	6.83%
New York C. & St. Louis	6%	76	7.89%
Norfolk & Western	7%	104 $\frac{3}{4}$	6.68%
Norfolk & Western Pfd.	4%	72 $\frac{1}{2}$	5.1 $\frac{1}{2}$ %
*Penn. R. R.	6%	41 $\frac{3}{4}$	7.1%
Pere Marquette	4%	41 $\frac{1}{4}$	9.6%
Pere Marquette Pfd.	5%	58	8.62%
Pere Marquette Pr. pf.	5%	70	7.1%
Pitts. & West Virginia Pfd.	6%	86	6.98%
Pullman Company	8%	115 $\frac{3}{4}$	6.9%
St. Louis Southwestern Pfd.	5%	56 $\frac{1}{4}$	8.8%
Southern Pacific	6%	86 $\frac{1}{8}$	6.26%
Southern Railway Pfd.	5%	66 $\frac{7}{8}$	7.4%
Union Pacific	10%	130	7.68%
Union Pacific	4%	72	5.1 $\frac{1}{2}$ %
Western Pacific	6%	56	10.7%
*Reading	8%	76 $\frac{5}{8}$	10.4%
Reading Pfd. 1	4%	53 $\frac{3}{4}$	7.4%
Reading Pfd. 2	4%	53	7.4%

NOV 12 1923

WM. R. STANSBURY

Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 330.

DAYTON-GOOSE CREEK RAILWAY COMPANY,

Appellant,

v/s.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE
COMMISSION, AND RANDOLPH BRYANT, UNITED STATES DISTRICT
ATTORNEY FOR THE EASTERN DISTRICT OF TEXAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF TEXAS.

B R I E F

ASSERTING UNCONSTITUTIONALITY OF PARAGRAPHS (5) AND (6) ET SEQ.
OF SECTION 15a, INTERSTATE COMMERCE ACT.

JOSEPH PAXTON BLAIR
EDGAR H. BOLES
JOHN F. BOWIE
ROBERT J. CARY
HENRY W. CLARK
HERBERT FITZPATRICK
LAWRENCE GREER
W. S. HORTON

WILLIAM S. JENNEY
E. W. KNIGHT
RICHARD V. LINDABURY
WILL H. LYFORD
SAMUEL W. MOORE
WILLIAM CHURCH OSBORN
WINSLOW S. PIERCE
HENRY V. POOR
JOHN H. AGATE
CARL A. DE GERSDORFF

AS Amici Curiae.



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Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 330.

DAYTON-GOOSE CREEK RAILWAY
COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COM-
MISSION, and RANDOLPH BRYANT,
UNITED STATES DISTRICT ATTOR-
NEY FOR THE EASTERN DISTRICT
OF TEXAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF TEXAS.

BRIEF

asserting unconstitutionality of paragraphs (5) and
(6) et seq. of Section 15a, Interstate
Commerce Act.

Statement.

By leave of Court, the undersigned attorneys and
counsellors of this Court, as *amici curiæ*, submit this
brief asserting the unconstitutionality of the statutory

provisions involved in the above-entitled suit, in the hope that the same may be of assistance in the decision of the important question before this Court. The undersigned are General Counsel, respectively, of the following companies: Southern Pacific Company; Lehigh Valley Railroad Company; Western Pacific Railroad Corporation; New York Central Railroad Company; Union Pacific Railroad Company; Chesapeake & Ohio Railway Company; Western Maryland Railway Company; Illinois Central Railroad Company; Delaware, Lackawanna & Western Railroad Company; Virginian Railway Company; Duluth, Missabe & Northern Railway Company; Chicago & Eastern Illinois Railway Company; Kansas City Southern Railway Company; El Paso & Southwestern Railroad Company; St. Louis Southwestern Railway Company and Wabash Railway Company; and Pere Marquette Railway Company; Assistant General Counsel of The New York, Chicago and St. Louis Railroad Company; and General Attorney of the New Orleans, Texas & Mexico Railway Company. The statute involved in this suit is of general application to railroad companies engaged in interstate commerce, and its provisions, if held valid, may in future operation substantially affect the interests of the above-named companies.

The Dayton-Goose Creek Railway Company brought the above-entitled suit in the District Court of the United States, for the Eastern District of Texas, seek-

ing to enjoin the enforcement of the provisions of paragraphs (5) and (6) *et seq.* of Section 15*a* of the Interstate Commerce Act (added by Section 422 of the Transportation Act, 1920) for the appropriation by the Government from railroad carriers engaged in interstate commerce of one-half of their net railway operating income in excess of 6 per cent. on the value of their transportation property, and for the restriction of the carriers' use of the remaining half. The District Court [Honorable R. W. Walker, United States Circuit Judge, Honorable Alex C. King, United States Circuit Judge, and Honorable Rufus E. Foster, United States District Judge sitting] denied an application for an interlocutory injunction and, on motion of the Government, dismissed the bill of complaint. From that action of the District Court the plaintiff has appealed to this court.

The text of Section 15*a* of the Interstate Commerce Act, added by Section 422 of the Transportation Act, 1920, approved February 28, 1920 [41 Statutes-at-Large, 488], is printed as an appendix to this brief.

POINT I.

The provisions of the statute appropriating a part of the net railway operating income, and restricting the use of a further part, are not a regulation of interstate commerce, but a direct confiscation of carriers' property and invasion of their property rights in violation of the Fifth Amendment.

The railroad situation confronting Congress as the occasion for the enactment of the Transportation Act is outlined in the opinion of this Court in *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy Railroad Company*, 257 U. S. 563, at pages 582 to 584. In a word, the carriers were about to be released from the Federal war control, with their credit crippled by causes which had existed prior to Federal control, and which had prevented the development of the railroad facilities of the country proportionately with the country's growth, and in addition burdened with enormously increased operating expenses. It was deemed essential to provide a new policy for the regulation of carriers.

In the Senate Committee Report on the bill which resulted in the Transportation Act (Report No. 304 of the 1st Session, 66th Congress, on Senate Bill 3288, Calendar No. 231), the situation was stated, in part, as follows:

"In considering this phase of the subject, it should
"be constantly borne in mind that if our policy is to be
"private operation of the instrumentalities of transpor-

"tation there must be a large and constant inflow of
 "capital. As commerce increases in volume, the fa-
 "cilities of transportation must increase; and, without
 "reckoning the funds which must be secured to dis-
 "charge maturing obligations already in existence, it
 "will be conceded by everybody that immense sums will
 "be required from year to year for new construction,
 "additional equipment, and necessary improvement.
 "The capital thus demanded must be drawn from those
 "who have money to invest, and, of course, it must be
 "voluntarily contributed. If the people who have
 "money will not invest it in the transportation enter-
 "prise, private ownership and operation under public
 "control must necessarily fail. It is apparent, there-
 "fore, that any legislation which may be proposed upon
 "the hypothesis of private ownership and operation
 "must tender to the future investor reasonable security
 "for the investment he is asked to make and reasonable
 "assurance of such yearly return upon his money as
 "will induce him to enter the field. The better the secu-
 "rity and the more certain the return, the less will be
 "the rate required to attract the investment."

In the *New England Divisions Case*, 261 U. S. 184,
 this Court referred to the Transportation Act, 1920,
 as introducing into federal legislation a new railroad
 policy and said: "Theretofore, the effort of Congress
 "had been directed mainly to the prevention of abuses;
 "particularly those arising from excessive or discrim-
 "inatory rates. The 1920 Act sought to insure, also,
 "adequate transportation service. That such was its

"purpose, Congress did not leave to inference. The "new purpose was expressed in unequivocal language. "And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a "wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service."

The provisions adopted to accomplish the purpose stated in the above quoted Committee Report and the *New England Divisions Case*, namely, to secure a return, to the railroads generally, calculated to attract new capital and to ensure an adequate transportation service, were those embodied in paragraphs (2), (3) and (4) of Section 15a. By these provisions the Commission is directed, in the exercise of its power to prescribe just and reasonable rates, to initiate, modify, establish or adjust rates so that the carriers in each rate group will earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return on the aggregate value of the railway property in such group used in the transportation service. The percentage constituting a fair return is fixed by the Act at 5½ per cent. for the first two years, with a possible allowance in the Commission's discretion of an additional one-half of one per cent. to provide for improvements chargeable to capital account, and after the expiration of the first two years the percentage is to be fixed by the Commission. In determining such percentage the Commission is directed to give due consideration to the transportation needs of the country

and the necessity of enlarging the transportation facilities in order to provide the country with adequate transportation.

The essential features of these provisions are a direction to make rates *on the group basis* and a mandate that the rates so made shall produce as nearly as practicable an *aggregate return for the group equal to a percentage of the aggregate property value of the group fixed*, by Congress first, and later by the Commission, *as a fair return*.

Paragraphs (2), (3) and (4) of Section 15a undoubtedly constitute a regulation of commerce. We do not question that their object—the promotion of the commerce of the whole country through the rehabilitation of the credit of the carriers and the necessary enlargement of transportation facilities—was within the granted power to regulate interstate commerce. We do not question that these provisions were appropriate and legitimate means to accomplish that object, subject to the qualification that the percentage constituting a fair return could not be conclusively fixed by Congress or the Commission. *Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins*, 176 U. S. 167, 173; *Lincoln Gas Co. v. Lincoln*, 250 U. S. 256, 267; *Bluefield Water Works and Improvement Co. v. Public Service Commission*, decided by this Court June 11, 1923.

Our challenge is directed to the subsequent provisions of Section 15a, those embodied in paragraphs (5) and (6) *et seq.* of that section.

Paragraph (5) is in the nature of an introduction to the substantial provisions of the subsequent sections.

It recites that it is impossible to establish uniform rates upon competitive traffic which will adequately sustain all the carriers without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return, and then declares that any carrier which receives a return so in excess of a fair return shall hold a part of such excess, prescribed in the succeeding paragraph, "as trustee for" the United States. Paragraph (6) provides that a carrier receiving in any year net railway operating income in excess of 6 per cent. on its property value shall place one-half of such excess in a reserve fund to be maintained by it and pay over the remaining half of such excess to the Interstate Commerce Commission for the purpose of establishing and maintaining a "general railroad contingent fund". Paragraphs (7) to (16) consist of regulations as to the reserve fund and the general railroad contingent fund.

For the sake of brevity, the provisions of paragraphs (5) to (16) will be collectively referred to as the income-appropriation provisions.

(a) It was the avowed purpose of the income-appropriation provisions to regulate the railway operating income of carriers, not by a regulation of their rates, but by taking from them a portion of their income, arbitrarily declared by the Act to be excessive.

The Senate Committee Report, *supra*, stated that during the pre-war test period the average net railway operating income of all the Class I railroads was 5.2 per cent. upon their aggregate property investment

and gave the returns realized by a number of individual roads during the same period, of which examples the highest rate of return was 7.54 per cent. and the lowest 1.77 per cent. Said report then states: "It is obvious that if the law gives to the carriers the assurance of income heretofore mentioned there should be a maximum beyond which an individual carrier shall not be permitted to retain for its own use all it may receive under a given body of rates. Referring to the illustrations already given, it is seen that with uniform rates, and they must be uniform in competitive territories, one carrier will receive an operating income of 2 per cent., another 4 per cent., another 6 per cent., another 8 per cent., and others still more. The bill fixes a standard of excess income and requires the carriers which receive an excess income (which will hereafter be explained in detail) to pay the excess to the transportation board for uses that have been mentioned and which will be more fully stated in a subsequent paragraph of this report". * * * " * * *

"If the lawyers who insist that taking excess income is unconstitutional are right in their premises, their conclusion would be unassailable. They assume that all the earnings of a given railway under a prescribed body of rates become the absolute property of the carrier which receives them. This is not true under the system which the bill creates; and, therefore, the conclusion is unsound. If there were but one railway in the country, it would be entirely possible for the regulating commission to fix rates for it under which it

"could not earn more than 6 or 7 per cent. upon the
 "value of its property, but we have a thousand railways;
 "and rates for transportation must be fixed with refer-
 "ence to all of them and to the needs of the people to
 "whom all of them render their service. These condi-
 "tions make it utterly impossible to fix rates which are
 "reasonable for one carrier, considered apart from all
 "the remainder. It is, therefore, in the competence of
 "Congress to declare that the income which any partic-
 "ular carrier receives beyond a fair return upon the
 "value of its property, it receives as a trustee for the
 "public and not as its own absolute property. If this
 "analysis of the power of regulation is not sustained,
 "then the authority granted in the Constitution is a
 "mere delusion."

The theory of the Committee is expressed in un-
 equivocal language. There is no pretence that the
 desired suppression of excess incomes is accomplished
 by rate regulation. On the contrary, it is stated that it
 is "utterly impossible to fix rates which are reasonable
 "for one carrier considered apart from all the re-
 "mainder." It is frankly recognized that the amount
 of alleged "excess income" seized will have been earned
 by the carrier from the prescribed body of rates. It is
 merely declared to be "obvious" that in consideration of
 the supposed greater assurance of a fair return, there
 should be a maximum beyond which an individual car-
 rier "shall not be permitted to retain for its own use all
 "it may receive". There is no claim that the portion of

income labelled "excess income" is differentiated from the income which the carrier is permitted to retain, by the manner of its acquisition or in any respect, except by the label given it by the statute because of its amount. The whole theory rests squarely upon the proposition that Congress can fix "a standard of excess income" and can prevent income realized in excess of that standard from becoming the carrier's absolute property by a declaration that such portion of its income is received by it "as trustee".

But we do not need to go outside the language of the Act itself to establish its purpose, for the recital in paragraph (5) makes the purpose entirely clear. This recital states:

"Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers * * * without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return * * * it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States".

In the statute, as in the committee report, the impossibility of limiting the income by making rates for the individual carrier is recognized. The statute like

the report, frankly recognizes all the income, whether within or beyond the limit of a "fair return", as received from the railroad operations under prescribed rates, without differentiation of character. The declaration of a trust character, asserted by the committee report to be competent and controlling, is made, and it is attempted to give this declaration the appearance of a regulation of commerce by the parenthetical phrase in the above quotation.

(b) Net income realized from operations in interstate commerce is not a part of commerce and the power to regulate interstate commerce does not include the regulation of such net income.

In *Second Employers' Liability Cases*, 223 U. S. 1, this Court said, at page 48: "As is well said in the brief prepared by the late Solicitor General: 'Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient' ". In the same case it was said, at page 47: "This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such

"as are prescribed in the Constitution. But, of course, "it does not extend to any matter or thing which does "not have a real or substantial relation to some part of "such commerce."

In the *First Employers' Liability Cases*, 207 U. S. 463, the Court said, at page 502: "It remains only to "consider the contention which we have previously "quoted, that the act is constitutional, although it em- "braces subjects not within the power of Congress to "regulate commerce, because one who engages in inter- "state commerce thereby submits all his business con- "cerns to the regulating power of Congress. To state "the proposition is to refute it." The act then under consideration attempted to regulate the liability of every common carrier engaged in interstate commerce for personal injuries suffered by its employes without qualification or restriction as to whether the employes at the time of their injury were engaged in interstate commerce or in intrastate commerce. Therefore, in accordance with the holding in the quotation last above that one who engages in interstate commerce does not thereby submit all his business concerns to the regulating power of Congress, the court held that act unconstitutional as extending to a subject not within the regulating power of Congress.

A number of other decisions of this Court have established limitations upon the subjects which Congress may regulate under the power to regulate commerce, comprehensive as is that power. Thus in *Ham-*

mer v. Dagenhart, 247 U. S. 251, it was held that an act, although adopted under the guise of a regulation of commerce in that it prohibited the movement in interstate commerce of the products of child labor, transcended the authority delegated to Congress over commerce. It was held that the *production* of articles intended for shipment in interstate commerce is not a part of such commerce but a matter of local regulation. It was said, at page 272: "The making of goods "and the mining of coal are not commerce, nor does the "fact that these things are to be afterwards shipped or "used in interstate commerce, make their production a "part thereof." In *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, it was held that the mining of coal by a railroad company, although for use in its locomotives in the conduct of interstate commerce, did not constitute interstate commerce. See also *United Mine Workers v. Coronado Co.*, 259 U. S. 344, 407-8. Again in *Adair v. U. S.*, 208 U. S. 161, it was held that a federal statute making it a criminal offence for an interstate carrier to discharge an employe because of his membership in a labor union was repugnant to the Fifth Amendment as not embraced by the power of Congress to regulate interstate commerce and the Court said, at page 178: "Such "relation to a labor organization cannot have, *in itself* "and in the eye of the law, any bearing upon the commerce with which the employe is connected by his "labors and services".

Applying the principle of the few cases cited under

this heading, it would be concluded, even in the absence of a precise precedent, that the limitation of net income resulting from operations in interstate commerce is not comprehended by the power to regulate such commerce. Commerce is an act. The net income resulting from the performance of that act is the fruit of the act but not a part of the act itself. The net income realized from the performance of the act of interstate commerce is a matter subsequent to and distinct from the commerce, as fully as the manufacture of goods to be shipped in interstate commerce and the mining of coal to be similarly shipped or to be used in the performance of interstate commerce are matters prior to and distinct from the commerce itself. But precise authority supporting this conclusion is not wanting.

In *United States Glue Co. v. Town of Oak Creek*, 247 U. S. 321, there was involved an income tax levied under a Wisconsin law. The taxpayer contended that a portion of the tax having been imposed upon income derived from interstate commerce was void as a burden upon such commerce. The income so in question was derived in part (1) from goods sold to customers outside of Wisconsin and delivered from the taxpayer's factory in Wisconsin and in part (2) from goods sold to customers outside of the state, the contracts of sale and the deliveries being made by branch offices of the taxpayer in other states and only the manufacture of the goods, prior to their sale, having occurred in Wisconsin. Notwithstanding the well-established principle that a state

tax upon gross receipts from interstate commerce is void as a burden upon such commerce (for example, *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326), it was held that the Wisconsin income tax law was not objectionable. It was pointed out that such a tax levied upon net income affected the revenues from interstate commerce in no greater degree than local taxes imposed upon property and franchises employed in interstate commerce, the validity of which had long been established, since both classes of taxes must be paid from the net returns of the business and diminish such returns in the same sense. The Court said, at page 328:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large".

Peck v. Lowe, 247 U. S. 165, involved the question whether the federal income tax, so far as levied upon net income derived from an exporting business, was contrary to the constitutional prohibition against the levy of taxes or duties on exports. While recognizing that previous decisions had interpreted the prohibition in question as requiring that exportation must be free from any tax which directly burdens such exportation, such as taxes upon charter parties, upon export bills of lading, upon policies of marine insurance, this Court held that neither the letter nor the spirit of that constitutional prohibition excluded a tax upon net income derived from the exportation business. The Court said, at page 175: "At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins".

The two cases above cited are precisely in point and conclusive upon the proposition now under discussion. Congress may of course, through the regulation of their rates, legitimately regulate and limit the operating *revenues* of interstate carriers. This was the power exercised and upheld in the *New England Divisions Case*, *supra*. But the income-appropriation provisions are not and do not purport to be

a regulation of rates. Such control over the operating *revenues* of interstate carriers belongs exclusively to the federal authority. The states may not control such revenues in any way. But the *net income*, determined by the charging of expenses and losses to the operating revenues, is a different matter. It is removed at least another degree from the act of transportation and is too far removed from the act of transportation or interstate commerce to constitute a part or an incident thereof. The cases cited, recognizing the power of the states to tax such net income derived from interstate operation definitely establish the distinction. It is, therefore, beyond the commerce power to regulate such net income.

(c) The net income which is the subject of the income-appropriation provisions is the unqualified property of the carriers, and evidences elements of value inherent in their railroads. A taking of the income is a confiscation not only of the amount in money so taken but also of a part of the value of the railroads themselves.

That the net income of the carriers is their property might well be rested upon the cases cited under the last preceding subpoint. To repeat a part of the language used in *Peck v. Lowe, supra*, "The tax is "levied after exportation is completed, after all expenses are paid and losses adjusted, and after the "recipient of the income is free to use it as he chooses." Like the tax there in question, the income-appropriation provisions of Section 15a operate after the interstate

transportation is completed, after all expenses are paid and losses adjusted, and, therefore, in the language of *Peck v. Lowe*: "after the recipient of the income is "free to use it as he chooses."

1. *The net income is earned from rates which must be presumed to be reasonable, and so is absolute property.*

The rates under which the net operating railway income are derived must be either unjust and unreasonable or just and reasonable rates. A carrier has no right to retain collections of transportation charges which are unreasonable. But any effort to sustain the income-appropriation provisions of this law on the theory that the subject-matter of the appropriation is the proceeds of unjust and unreasonable rates encounters insurmountable obstacles which are dealt with under Point II of this brief. If the rates are just and reasonable, the carrier is entitled to the receipts therefrom as its property, and the taking of any part of such receipts (except under a valid tax) equally with the taking of any other property of the carrier is prohibited by the Fifth Amendment.

We submit that it must be conclusively assumed, for the purposes of this case, that the rates from which the net railway operating income sought to be appropriated were derived were just and reasonable, subject to the power of the Commission reserved by paragraph (2) of Section 15a to find that particular rates are unjust or unreasonable.

Up to the enactment of the original Act to regulate commerce the charges of common carriers were governed in this country as they had long been in England by the rule of the common law that rates must be just and reasonable. *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 275. The original Act to regulate commerce of 1887 prescribed the same rule and was merely declaratory of the common law, *Maximum Rate Case*, 167 U. S. 479, 501. That rule is still expressed in Section 1 of the Interstate Commerce Act as it exists today. Paragraph (2) of Section 15a recognizes the standard of justness and reasonableness as the basic rule of rate-making under the present law, for it is expressed that the group basis rule of rate-making laid down for the Commission's guidance is to be observed "in the exercise of the Commission's power to prescribe just and reasonable rates". The new rule of rate-making subtracts nothing from the former rights of the carriers to just and reasonable rates. If any change has been effected by the new rule, there has been something added by the affirmative recognition and declaration that the rates which it is just and reasonable for the shipper to pay are rates sufficient to provide for the enlargement of transportation facilities commensurate with the growth of the country's need for transportation.

The Interstate Commerce Commission is the sole arbiter of the justness and reasonableness of interstate rates. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. This has not been changed by any

provision of the Transportation Act. Pursuant to the authority of paragraph (2) of Section 15a, the Commission in August, 1920, prescribed general rate increases for the various rate groups in *Ex Parte 74, Increased Rates, 1920*, 58 I. C. C. 220. The rates so prescribed are the rates from which the net railway operating income involved in the present case were derived, as far as it came from interstate business. Said rates constituted the lawful rates for the use of every carrier of the group for which they were prescribed. There attaches to them as complete and conclusive sanction as to reasonableness as if they had been specifically named in an act of Congress. Their character of finality is emphasized by the proviso to paragraph (2) which allows the Commission "reasonable latitude" to modify and adjust particular rates. The body of rates so prescribed under paragraph (2) must necessarily be reasonable, judged as a whole, for the average carrier of the group—average as to earning capacity, operating costs and property value—for this is in effect the premise of the rate structure of the group. If the rates are reasonable for the public to pay for the services of the average carrier or the less-than-average carrier of the group, they must be reasonable as charges for the services of the more prosperous carrier also.

It has never been held that the boundary line of confiscation, say a 6 per cent. return, is the maximum a carrier may lawfully and properly earn and retain under rates just and reasonable to the public. The use of a

specified percentage of return on property value, usually but not always 6 per cent., has always been limited to the function of determining whether an entire body of rates prescribed under governmental authority is so low as to amount to the use (the taking) of the carriers' property by the public without compensation. In the language of *Smythe v. Ames*, 169 U. S. 466, 546, the judicial question in this class of cases is "whether the Legislature has, under the guise of regulating rates, exceeded its constitutional authority, and "practically deprived the owner of property without due "process of law". See also *Railroad Commission Cases*, 116 U. S. 307, 331; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 41; *Reagan v. The Farmers' Loan and Trust Co.*, 154 U. S. 362, 397, 410.

The fact that one or more carriers out of a larger number in a given territory may realize a greater profit than the average or less-than-average carriers in that territory out of the rates legally established for that group in no sense involves an extortion or overcharge. There is nothing morally or legally wrong in a carrier realizing a large net profit from a schedule of reasonable rates. The fact that the situation and position of the carrier is such that it can show a large profit upon a schedule of rates which the Commission finds it proper to establish for all the carriers in the same territory evidences the exceptional value of the fortunate line and/or the greater efficiency of its operations.

From the same schedule of rates, just and reasonable to the carriers and to the public, different results

will be obtained by different carriers in the same general territory or competing for the same business. The reasons and causes contributing to the difference in operating results cannot be comprehensively catalogued. They are partly results of fortunate location and other natural advantages, and partly the results of foresight and wisdom in management and efficiency of operation.

So long as the rates from which the earnings are derived are just and reasonable, the relatively greater income of one carrier, to whatever cause due, is its absolute property, as fully as the smaller income of some other carrier is its absolute property.

It is the intent of the income-appropriation provisions under consideration to annul all advantages of the more successful carriers, whether due to location and other natural causes, or to superior management and operation. It is pertinent to quote from the opinion of the Commission in *Investigation and Suspension Docket No. 26*, 22 I. C. C. 604, at page 625: "A further consideration which moves us to permit these advanced rates is that we regard it as unfair to take from the carrier whatever of profit it may secure by reason of improvement in its plant and adoption of the most modern methods. If our railroad systems are to remain in private hands, stimulus must be given to the initiative and imagination of railroad operators. * * * This road is one of the most prosperous in the country, and it is largely so because of the enterprise of its officials in developing a great business and in handling it in the most economic method".

2. The net income evidences elements of value which are an essential part of the railroad property.

While greater efficiency in conducting operations and in soliciting traffic may be one of the causes contributing to the greater net income realized by one carrier as compared with another, the difference in net income is more often and to the greater extent due to superior location. Such superior location may be an accidental advantage or it may be due to sound judgment exercised in the original location of the road, to a long-practiced and intelligent policy in encouraging and assisting in the development of the country, and to a generous and wise expenditure of additional capital in improving and enlarging its facilities. In any event, it is an element of value.

The railroad business is essentially a competitive business. It operates in a competitive field under a reasonable rate schedule fixed for all of the roads in that territory. It is an axiom of economics that where competitive forces act freely, value is the result of the forces of supply and demand. The true value of a railroad depends primarily upon the demand for its transportation service, the extent to which in competition with its rivals it can supply that service, and the economy with which it can do it.

The same rates must be fixed for the entire territory. Under a schedule of rates thus fixed, it will always occur that certain roads will be able to handle

more traffic and at a greater profit than others, and there will inevitably emerge certain differentials of value because of the possession by certain roads of certain qualities and potentialities which are the very crux of the question of their economic value. These differentials will be indicated by differences in earnings, which are the evidences of the existence of certain elements of value. The earnings themselves are not the cause, but the effect, of value arising from qualities inherent in the property. These are qualities resulting largely from location. They exist because of factors dependent on location such as the density of population, the number and diversity of industries, the productivity of the territory served, the relationship of the carrier's line to centers of population and industry, and the location of the carrier's terminals in cities. Factors of that sort affect the demand for the carrier's facilities and the economy and efficiency with which the demand can be served. Certain of the factors of location are reflected in the degree of the efficiency and economy of operation, such as the relative directness of the carrier's route, the gradients, the amount of curvature, and a great variety of physical conditions and qualities arising from the nature of the country traversed, and its topographic, climatic, and other conditions. These qualities and factors are numerous and complex. They are incidents of rights in private property. They are qualities of the property, decisive of its value.

Such elements of value are reflected in superior earning capacity. They are like the elements of value in the location of a business lot. Assume that two men purchase business lots for the same price on different streets of the same city and that business development greatly increases the utility of one of these lots and its economic value, but not of the other. That increase belongs to the owner. It is clear that any statute which would deprive the owner of the better lot of the increased revenue due to its superior location, thereby virtually making it equivalent in value to the poorer lot, would destroy that differential increment in value due to the advantage of location. Such an appropriation would violate established conceptions of rights in private property. By an exact parity of reasoning, a confiscation of the value of the property is effected when an appropriation is made of the income, realized under a competitive rate schedule fixed as reasonable for a group of carriers, of a road which develops a superior degree of utility and economy because of physical and other qualities of its property, due to its location, as, for example, a superior route secured in pioneer days when it avoided grades and tunnels, its location with reference to centers of population, and trade routes, and its efficiencies in construction and operation. The effect of the income-appropriation provisions is to confiscate these superior elements of location and elements of value.

Such appropriation of elements of value due to location would not be sanctioned were it attempted in the

case of city building sites or farm property. The appropriation cannot be justified in the case of railroad property, unless it is held that railroad property is not within the category of private property. But railroad property is private property. The attempt has been made to prevent the public utility from securing a return on elements of value in the category of the so-called "unearned increment", but thus far such attempts have failed because it has been held that the property of a public utility is private property and that such elements, therefore, are not subject to confiscation.

In the *Minnesota Rate Cases*, 230 U. S. 352, it was argued that a railroad is not private property, and it was urged that elements of value in railroad property partaking of the nature of the value inherent in other private property were not protected by the Constitution. But this Court repudiated the contention, saying at page 433:

"The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge for the service rendered. But the State has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title but to the right to receive just compensation for the service given to the public."

And further, at page 454:

"The property is held in private ownership and it "is that property, and not the original cost of it, of "which the owner may not be deprived without due "process of law."

See also: *San Diego Land and Town Co. v. National City*, 174 U. S. 739; *Wilcox v. Consolidated Gas Company*, 212 U. S. 19; *San Joaquin Company v. Stanislaus County*, 233 U. S. 454.

To hold that the income-appropriation provisions are valid would, therefore, sanction the confiscation, by this method, of elements of value, which this Court has consistently refused to sanction in the rate-confiscation and condemnation cases. Such a holding would foreclose for the future the reliance upon the value of the property as a test of Constitutional protection, because the confiscation of income, which is in effect an appropriation of the superior elements of location reflected only in income, is necessarily a confiscation of those essential elements of value and a destruction of the value of the property due to them.

(d) The statutory declarations that the income to be appropriated is excess income and that it is held in trust are not competent to qualify the title of the carriers thereto.

The declarations in this statute that the net railway operating income sought to be appropriated is "in excess of a fair return" and that the carrier holds it "as trustee for" the United States are ineffective to deprive such income of its character as the absolute

property of the carrier. Nor is the perfunctory attempt by the parenthetical language of the recital of paragraph (5) to characterize these provisions as a regulation of commerce effective to make that a regulation of commerce which in fact is a plain excess of the power over interstate commerce. These terms are mere euphemisms to soften or disguise the purpose of confiscation. They cannot overcome the stubborn facts.

In *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, it was said, at page 227: "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect".

In *Chicago, Burlington & Quincy R. R. Co. v. Drainage Commissioners*, 200 U. S. 561, it was said, at page 593: "If the means employed have no real, substantial relation to public objects which the government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action."

In *Hammer v. Dagenhart*, 247 U. S. 251, and in the *Child Labor Tax Case*, 259 U. S. 20, the statutes involved were held invalid because their purpose was to regulate the employment of child labor, a matter beyond the federal power, although the statutes were enacted, in the one case in the form of a regulation of commerce, and in the other in the form of a tax law.

In *Adair v. U. S.*, 208 U. S. 161, the statute was held invalid because its real subject-matter was the membership of employees in labor organizations, although it was enacted under the guise of a regulation of interstate commerce. In *Norwood v. Baker*, 172 U. S. 269, it was held that property was taken without due process although the proceeding was in form taxation. Citations to the same effect might be multiplied indefinitely.

We believe we have demonstrated that the net railway operating income of interstate carriers is not a part or incident of interstate commerce and is at least one degree removed from the power to regulate such commerce. The power of Congress to affect such income in any way must be exerted and will be exhausted before the net railway operating income is realized and ascertained. That power is confined to action upon the act of commerce itself or the incidents of commerce which may be deemed a part of it, of which the transportation rates are the principal but not the sole example. But in the case of the income-appropriation provisions under consideration no attempt has been made to affect the amount of the net railway operating income through such legitimate means. Instead, Congress has resorted to a succession of legislative fiat, namely: (1) that a fair return for a group of carriers is $5\frac{1}{2}$ per cent. for the first two years, and thereafter whatever the Commission shall in its judgment determine; (2) that one-half of any net railway operating income in excess of 6 per cent. is "substantially and unreasonably in excess of a fair return", and

(3) that such alleged substantial and unreasonable excess is held "in trust for" the United States. Not one of these three legislative declarations is it competent for Congress to make. The amount which constitutes due compensation for a taking of property or a fair return for the use of property in public service is a judicial and not a legislative question. *Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins*, 176 U. S. 167. *Lincoln Gas Company v. Lincoln*, 250 U. S. 256. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327. *Seaboard Air Line v. United States*, 261 U. S. 299, 304. The declarations that a part of the net railway operating income is substantially and unreasonably excessive and that it is held in trust amount to an attempt to create a trust solely by the declaration of the beneficiary without the consent of the owner of the property which is to be appropriated as the trust fund. There is no corpus of the trust. No funds are segregated or identified as funds held for the Government. The "trust" would be imposed upon a wholly unidentified portion of the carrier's general assets used by it in its business.

Of course, the theory of these provisions was that a statutory declaration that net railway operating income realized in future operations in excess of a specified amount should not become the property of the carrier would arrest the vesting of title to the operating revenues and hold it in suspense until the whole operations of the year were completed and the net railway operating income of the year determined. The theory

is utterly untenable. The act makes no provision for anything which affects the character of the revenues as they accrue, or which can have the effect of arresting the vesting of absolute title. The carrier from whom this income appropriation is to be made is left to operate under the rates prescribed by the Commission, the rates applicable to all carriers. There is no declaration that such rates will be deemed unreasonable in the case of any carrier. There is no provision for an adjudication by the Commission that such body of rates is unreasonable as to any carrier. There is simply an appropriation at the end of the year of a part of the carrier's net railway operating income, and the amount so appropriated is in no way identifiable with any particular shipment or class of traffic and is not even capable of identification as the product of interstate business as distinguished from intrastate business.

The regulation of commerce is essentially prospective in its operation. The income-appropriation provisions, however, are essentially an attempt to regulate by *ex post facto* procedure. The proponents of this legislation would, of course, not claim that Congress could enact a law appropriating a specified part of the income realized by interstate carriers from operations of a year or years prior to such enactment. This would admittedly be a plain case of confiscation. But the only difference between such enactment and the statutory provisions under consideration is that in the supposed case no warning of the intended confiscation was given the victims while in the present case they

have been warned. *The statutory declarations that a part of the income is unreasonably in excess of a fair return and that the same is held in trust for the United States amount to nothing more than a warning or notice of the contemplated confiscation.* We submit that judicial sanction cannot be given to the theory that a taking of property can be legalized simply by giving notice or warning that if the citizen owns described property at a specified date in the future it will be taken from him.

(e) This attempted appropriation of income is not an indirect or consequential result of any legitimate exercise of Congressional power, but is a direct confiscation of property.

Congress may adopt means to accomplish an object within its granted powers, although such means incidentally and consequentially affect private property, without thereby infringing the rights of property guaranteed by the Fifth Amendment,—the damage is *damnum absque injuria*. *Gibson v. U. S.*, 166 U. S. 269, 275; *Transportation Co. v. Chicago*, 99 U. S. 635; *Union Bridge Co. v. U. S.*, 204 U. S. 364, 388. But, even if the object sought to be accomplished by Congress is within its granted power, it does not justify the actual taking or direct invasion of private property *Bedford v. U. S.*, 192 U. S. 217, 225.

In *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312, it was said at page 336:

“Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control,

"it deems it necessary to take private property, then it
 "must proceed subject to the limitations imposed by this
 "Fifth Amendment, and can take only on payment of
 "just compensation. The power to regulate commerce
 "is not given in any broader terms than that to establish
 "post-offices and post roads; but, if Congress wishes to
 "take private property upon which to build a post-office,
 "it must either agree upon the price with the owner, or
 "in condemnation pay just compensation therefor."

In *Chicago, Burlington & Quincy v. Drainage Commissioners*, 200 U. S. 561, the court said at page 593:

"If in the execution of any power, no matter what it
 "is, the Government, Federal or State, finds it necessary
 "to take private property for public use, it must obey the
 "constitutional injunction to make or secure just com-
 "pensation to the owner."

We have already shown that the purpose primarily sought to be accomplished by the provisions of Section 15a was to rehabilitate the credit of the carriers and to provide rates adequate not only to sustain the carriers in their then existing condition, but to enable them to increase their facilities to meet the growing transportation needs of the entire country. To this end, the rule of rate-making embodied in paragraphs (2), (3) and (4) was adopted. This rule of rate-making on a group basis would presumably result in increased gross and net revenues to carriers in the group and individually. In any event it was the intention of Congress to sanction or encourage a more liberal rate policy than had been

practised in the past. The primary purpose was within the power of Congress and the rule of rate-making adopted as a means was appropriate to the purpose. But when this prescribed rule of rate-making should be put in force by the Commission and adequate revenues to rehabilitate the credit of the carriers should be derived therefrom, the primary purpose of Congress would be wholly accomplished. No further means were necessary to its attainment.

But it was feared that, as recited in paragraph (5), under the rate policy so prescribed, some carriers would derive an income "substantially and unreasonably" in excess of the percentage of value determined upon as constituting a fair return, or, in other words, that some carriers would earn more than it was contemplated and desired the average carriers should realize and therefore more than Congress was willing they should retain. If the result so feared should come to pass, the primary object for which Congress was working would be in no way defeated thereby. The fact that some carriers might earn more than the return contemplated for the average carriers, or even the fact that some carriers might earn an amount unreasonably in excess of a "fair return", would not tend in the least to defeat such primary object and purpose of the legislation. It might make a few carriers unnecessarily prosperous. It might incite criticism of the scale of rates by the public based on the favorable results to a few carriers and ignoring the fact that the rates were made with reference to the needs and deserts of the

average carriers and were just and reasonable by such standard. But any such public criticism, apprehended by Congress, while having possible political significance, would have no tendency to impair the adequacy of the revenues of the carriers as a whole, the rehabilitation of their credit and the proper development of the nation's transportation plant, all of which constituted the primary object of the legislation. Any such prosperity of a few carriers, and any such consequent public criticism *would be only a consequence and result of the rule of rate-making adopted* as an appropriate means of accomplishing the end sought by Congress. They would constitute a new situation and a separate and distinct problem. To avoid that consequence and result Congress has seen fit to provide for depriving the prosperous carriers of such amounts of their railway income as Congress has chosen to consider excessive (and to do so simply by the legislative declaration, made in advance, that such portion of income, if realized, shall be held in trust by the carrier), and for restrictions upon the carriers' use of a further portion of their income. This cannot be considered, by any stretch of the imagination, a means, either appropriate or inappropriate, adopted for the accomplishment of an object within the power to regulate commerce. Congress has by paragraphs (2) to (4) of Section 15a adopted an appropriate means, to wit, a rule of rate-making, for accomplishing the promotion of interstate commerce which was the primary object of its action. The provisions embodied in paragraphs (5) and (6), to wit,

the appropriation and control of the disposition of net railway operating income, do not constitute another means adopted to accomplish the primary purpose, but a means of nullifying a consequence and result, deemed undesirable, of the means adopted to attain the primary end. As such, these provisions have no relation, in the eye of the law, to any object within the power to regulate commerce, but constitute the taking of and interference with the property of the carriers, as the end and object, in the legal sense, of the action.

(f) The allocation of a part of the net railway operating income to a reserve fund and the restriction upon the use of such fund by the carrier amount in legal effect to a deprivation of property without due process, equally with the complete appropriation of a portion of the net railway operating income.

The direction of paragraph (6) of Section 15a is that one-half of the net railway operating income in excess of 6 per cent. on the property value "shall be placed in a reserve fund established and maintained by such carrier". Paragraph (7) provides that for the purpose of paying dividends or interest or rent for leased roads a carrier may draw upon this reserve fund but only to the extent that its net railway operating income in any year is less than 6 per cent. upon its property value. By the provisions of paragraph (8) the reserve fund need not be further added to after it aggregates a sum equal to 5 per cent. upon the carriers' property value and after this maximum has been at-

tained the one-half of the net railway operating income in excess of 6 per cent., theretofore required to be placed in the reserve fund, may be used by the carrier for any lawful purpose. But it should be observed, first, that the reserve fund never, even when the net railway operating income falls below 6 per cent., can be used for any purpose other than the payment of dividends, interest and rent for leased road. It cannot, for example, be appropriated for additions and betterments. It should be observed in the second place that, so long as the carrier continues to realize an excess of 6 per cent. of net railway operating income, the amount accumulated in the reserve fund cannot be used for any purpose whatever, but is perpetually impounded. Even after it has been accumulated to the prescribed maximum of 5 per cent. upon the entire property value it must be kept absolutely intact, unless, and then only to the extent that, the net in any year shall fall below the 6 per cent. standard.

It is established by the decisions of this court that the value of property results from the use to which it is put and depends upon the profitableness of that use, present and prospective, actual and anticipated. As stated in *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus*, 154 U. S. 439 at 445: "There is no pecuniary value outside of that which results from such use." This language was quoted with approval in *Branson v. Bush*, 251 U. S. 182, 187.

In *Buchanan v. Warley*, 245 U. S. 60, the question concerned was the validity of a city ordinance adopted

for the expressed purpose of preventing conflict and ill feeling between the white and colored races and to preserve the public peace and to promote the general welfare, which made it unlawful for a person of either race to occupy a house upon any block upon which the greater number of houses were occupied by persons of the other race. The invalidity of the ordinance was asserted by a white person who had contracted to sell to a colored person a house which under the terms of such ordinance could not be occupied by a colored person. The ordinance was held invalid. The court said, at page 74: "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. *Holden v. Hardy*, 169 U. S. 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries [Cooley's Ed.], 127."

In *Coppage v. Kansas*, 236 U. S. 1, the court said, at page 18: "In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. But, in our opinion, the Fourteenth Amendment debar[s] the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the ac-

"complishment of some other and paramount object, and one that concerns the public welfare."

In *Great Northern Railway Co. v. Minnesota*, 238 U. S. 340, it was said, at page 346: "A railroad's possessions are subject to its public duty but beyond this and within charter limits, like other owners of private property, it may control its own affairs."

In *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229, a statute which prevented the removal of natural gas from the state of its production was held invalid. This Court said, at page 254: "It does not alone regulate the right of the reduction to possession of the gas, but when the right is exercised, when the gas becomes property, takes from it the attributes of property, the right to dispose of it; indeed, selects its market to reserve it for future purchasers and use within the State on the ground that the welfare of the State will thereby be subserved. The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce."

The requirement that a part of the net railway operating income shall be set aside as a reserve fund and the limited use permitted of this reserve fund substantially impair the carrier's enjoyment of this portion of its funds. If, as heretofore argued, the net railway operating income accrues to the carrier as its property

and the attempted assertion of a trust does not operate to arrest the vesting of such title, the use of the fund represented by such net railway operating income is beyond the power of government dictation and restriction. A substantial restriction upon the use of the carrier's funds is as much a deprivation of its property right therein as is the actual and complete appropriation of such funds by the government.

(g) The income-appropriation provisions cannot be sustained on the theory that their result is equivalent to a result which might be obtained by prescribing different rates for different roads.

The argument has been advanced by advocates of this law that different rates may lawfully be prescribed for different carriers in the same territory, classified according to their prosperity, that by this means a limitation of the incomes of carriers to a selected rate of return could have been effected, and that the carriers have no ground for complaint against the statute under consideration which, it is said, merely accomplishes the same result by a different method. The foregoing argument appears to involve a premise of law, a premise of fact and a conclusion, each of which we believe to be unsound.

The premise of law is that different rates may lawfully be prescribed for different roads upon the sole consideration of their income and for the sole purpose of limiting their net income to a selected rate of return, provided only that the rates so prescribed shall not as to

any particular carrier so reduce its aggregate return as to amount to confiscation. It is true that it is not required, as a matter of law, that rates shall be the same for the same distance over two different roads (*Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, 551), or that all turnpike companies in a state shall be placed upon an equality of rates (*Covington & Lexington Turnpike Road Company v. Sandford*, 164 U. S. 578, 598). But in the former of the cases just cited it was held merely that the Commission did not act arbitrarily in continuing a difference in rates which the carriers themselves had established and maintained, giving consideration to the weight and character of the reasons and causes which prompted and justified the carriers in their action; and in the latter case it was held merely that the circumstances of each turnpike company must determine the rates properly allowed for its use and that "all the circumstances" must be considered in determining what compensation for the use of the property will be just both to the turnpike company and to the public. Cases are cited in support of this legal premise involving state laws classifying railroads according to earnings, of which *Chicago, Burlington & Quincy R. R. Co. v. Iowa*, 94 U. S. 155, has been the leading citation. In that case the carrier attacked Chapter 68 of the 1874 laws of Iowa which classified railroads in three classes according to the amount of their gross earnings per mile and provided different maximum rates for each class. The principal contention made by the carrier was that under its char-

ter its rates could not be fixed by the state. The only reference by this Court to the matter of classification was as presenting the question whether the law was in conflict with the provision of the state constitution requiring all general laws to have a uniform operation. In *Chicago & Grand Trunk Railway Co. v. Wellman*, 143 U. S. 339, the only point decided or discussed was the refusal of the trial court to instruct the jury for the defendant, it being held that the evidence was too meagre to have justified such instruction. *Dow v. Beidelman*, 125 U. S. 68, involved an attack upon an Arkansas law prescribing maximum rates of 8 cents a mile on railroads 15 miles or less in length, 5 cents on roads over 15 and less than 75 miles, and 3 cents on roads over 75 miles in length. The case was dismissed because the Court considered the record insufficient to show that the return to the complainant under the three cent rate would amount to confiscation. A contention that the carrier had been denied the equal protection of the laws was dismissed with the statement [p. 691]: "The Legislature, in the exercise of its power of regulating fares and freight, may classify railroads according to the amount of the business which they have done or appear likely to do". The statement quoted falls far short of sustaining the legal premise of the argument under consideration. At most, it recognizes classification on the basis of earnings per mile as *not violating the equal protection clause*, for the purpose of imposing *some* differentiation in rates. It certainly does not sustain the proposition that rates may

be made upon the sole consideration of the prosperity of the carrier, or the proposition that they may be made for the sole purpose of limiting the carrier's income to a selected return, with due regard to the provisions of the Fifth Amendment. In further support of the said legal premise, reference has also been made to the confiscation cases in which an entire body of state rates has been upheld as to some carriers while being held confiscatory as to another carrier, as in the *Minnesota Rate Cases*, 230 U. S. 352, 469-473. There is usually in a given rate group a weak carrier which operates under such disadvantages and enjoys so little traffic that it cannot earn a fair return on any body of rates practicable in competitive territory. Such a result as was reached in the *Minnesota Rate Cases* in respect of the Minneapolis & St. Louis Railroad Company might be avoided if the charge of confiscation were met by the available showing of the inability of the road to earn a fair return under any reasonable rates. See *Darnell v. Edwards*, 244 U. S. 564, 570, in which it was held that the fact that a road was unwisely built, in a locality where there is not sufficient business to sustain it, might be considered. However, no conclusion properly follows from the result mentioned in the *Minnesota Rate Cases*, except that one carrier had made out a case of inadequate return, and therefore confiscation, while the other carriers had failed to prove their case. We argue at length under the following Point II, sub-point (a), of this brief that the inadequacy of return on the entire property of a carrier resulting from rate regulation is

not the sole ground of complaint against such regulation, that, regardless of the adequacy of the entire return, arbitrary and unreasonable rate regulation is void for want of due process of law, and that an adjustment of rates governed by the amount of net railway operating income of the carriers as the sole and conclusive consideration would be so arbitrary and unreasonable as to be void. That argument and the authorities cited for its support are conclusive of the unsoundness of the legal premise under consideration.

The premise of fact involved in this argument is that it would be *practicable*, through the means of prescribing different rates for different carriers, to effect a limitation of the incomes of carriers to a selected rate of return. It is true that this fact premise is not asserted by the advocates of this law. On the contrary it is universally conceded to be impracticable to apply different rates for different roads on competitive business, for the entire traffic would seek the road charging the lowest rate and the result would be that the strong road would enjoy increased prosperity by reason of the increased volume of business. We submit, however, that the premise of fact stated is necessarily involved in the argument under consideration, and that the admission that the operation of an economic law prevents the making of different rates for different roads destroys the argument. The argument is that the carriers have no ground for complaining of the income-appropriation provisions of this statute because they merely accomplish a result—the limitation of the incomes of

carriers to a selected rate of return—which could be accomplished through the means of different rates for different roads. We say that this argument necessarily means not only that the same result could, as a *matter of law*, be accomplished through the means of different rates, but also that it could, as a *matter of fact*, be accomplished through such means. Now, it is perfectly impracticable to accomplish the same result through the prescribing of different rates, because such difference in rates would immediately cause so radical a change and diversion in the flow of traffic and in the relative volume of traffic carried by the various participating lines that the object sought would be wholly defeated. The prosperous roads would thereby be made more prosperous and the weak roads would be ruined. When this is admitted, the argument is reduced to the proposition that the carriers have no ground for complaining of the income-appropriation provisions because they merely accomplish a result which might *legally* be accomplished by prescribing different rates for different roads, *if it were practicable* to adopt that course, which the advocates of this argument admit that it is not. In other words, we are asked in this argument to assume a purely imaginary result, as a result of the operation of differentiated rates for different roads—to assume that such rates would cause no change in the flow of traffic, and to assume that the carrier limited to the lower rate would neglect all available means of increasing its net income, such as by reduction of operating expenses, or by more intensive solicitation, or by the attraction of improved service.

But if both the premise of law and the premise of fact, above stated, be admitted, the conclusion drawn therefrom is unsound. That conclusion is, that because the limitation of carrier incomes to a selected rate of return could be accomplished through rate regulation, the same object may be accomplished by any other method, without resorting to rate regulation. In other words, the conclusion has for its basis the obviously unsound assumption that whatever result may be brought about, or whatever purpose may be accomplished, as one of the effects, direct or incidental, of the exercise by Congress of a constitutional power, the same may be effected, *without the exercise of the power*, by the short-cut method of direct legislation. The mere statement of this assumption is sufficient to show its unsoundness. If Congress were without power to regulate the issuance by state banks of notes to circulate as money, an act directly prohibiting such issuance of notes could not be sustained by showing that the same result might have been attained through the exercise by Congress of its taxing power. When Congress was without power to restrict or regulate the sale of intoxicating liquors, an act directly restricting or regulating such sale could not have been saved by showing that the same amount of restriction or regulation might have been effected by the exercise of the power of Congress to levy excise taxes. A man may be hanged in this country only according to law. If Congress desires to condemn any carrier to an income not in excess of what Congress deems to be a fair rate of return, it must do so

through the exercise of some one of its constitutional powers. It cannot do so by legislative appropriation and sustain such legislation on the ground that the same result could have been attained by the exercise of its power to regulate interstate commerce or by the exercise of some other power.

The arbitrary character of the income-appropriation provisions appears to be emphasized rather than mitigated by this different-rate theory.

(h) The *New England Divisions* case is plainly distinguishable.

The *New England Divisions* case, 261 U. S. 184, concerned an order of the Commission made under the authority of Section 15 (6) of the Interstate Commerce Act, as amended by the Transportation Act, which order increased the divisions of the New England carriers in joint freight rates participated in by them with the carriers operating west of the Hudson river. It was held that the amendment of the section as to divisions authorized the consideration of the financial needs of particular carriers so as to maintain them in effective operation as a part of an adequate transportation system in the general public interest. In other words, the promotion of the transportation interests of the country as a whole was a purpose of the amendment of the law concerning divisions, just as it was the purpose of the new rate-making provisions of Section 15a. This court said, at page 191: "To accomplish this two 'new devices were adopted: the group system of rate-

"making and the division of joint rates in the public interest." It was contended in that case that if the Act were construed in accordance with the above-stated holding of the Court it was unconstitutional in that the division of a joint rate is essentially a partition of property, that the rate must be divided on the basis of the services rendered by the several carriers and that a division otherwise based was equivalent to the taking from a carrier of a part of the cash in its treasury. This contention was rejected by this Court, holding that the division of a joint rate was not to be determined by mileage alone or cost of service alone. General rate increases for all groups had previously been authorized and the subsequent order as to divisions had the effect of further increasing the revenues of the New England carriers and correspondingly diminishing the increase of revenues which would otherwise have resulted to the other carriers in the eastern group from the previous general increase. This Court said, at page 196: "No part of the revenues needed by the New England lines is paid by the western carriers. All is paid by the community pursuant to the single rate increase ordered in *Ex Parte 74*." It was reasoned that the order as to divisions might properly be deemed a supplement to, or modification of, the order by which the general rate increases had been effected.

The difference between the *New England Divisions* case and the present case is fundamental. The subject-matter dealt with by Congress and by the Commission in the matter of divisions was rates, specifically. The

regulation of divisions affected the revenues of the carriers, but it did so by means legitimate for the government to exercise. The reduction of revenues of certain carriers by modifying the divisions of joint rates affected their revenues in precisely the same way that revenues are affected by reductions of individual rates; both in law and in fact the principle is the same. The operation of the regulation was thus to affect the revenues before they came into being, before the service was rendered and the revenues were earned. Finally, it was the gross revenues which the regulations affected directly, and not the net railway operating income, which can be determined only after the service is rendered and the expenses and losses are charged against the gross revenues. The income-appropriation provisions of Section 15a, quite to the contrary, involve no regulation of rates, either joint or individual, do not make any provision which arrests or prevents the receipt of the revenue, but, after the service has been performed under the lawful rates and under the lawful divisions, and after the revenues have been received and in the processes of accounting have been charged with the expenses and losses of the railroad operations, attempt directly to take from the carriers an amount which can be ascertained only after the operations and accounting mentioned have been completed.

The holding in the *New England Divisions* case that it is within the power to regulate commerce to authorize the Commission to take into consideration, in establishing divisions of joint rates, the financial needs

of particular carriers because of the general public interest in an adequate transportation system, cannot be stretched to the extreme of sanctioning a direct appropriation of income earned by the carriers, on the theory that such action will promote the general public interest through the maintenance of an adequate transportation system. In the first place, the appropriation of such income has no tendency whatever to promote the public interest; the amount paid by the public for its transportation is not reduced and the transportation facilities of the whole country are not increased thereby. In the second place, even if the appropriation of income had some tendency to promote the said public purpose, it would not be within the power of Congress to promote that purpose by a direct appropriation of income (property), as is attempted by this statute, in contradistinction to accomplishing the purpose through an exercise of its power to regulate some part of interstate commerce.

In the *New England Divisions* case, at page 191, the Court, referring to the group system of rate-making, said: "Through the former, weak roads were to be 'helped by recapture from prosperous competitors of 'surplus revenues.'" We think the quoted expression was an inadvertence due to the fact that the provisions of Section 15a were not litigated in that case and so were not the subject of careful analysis. We show under a subsequent heading of this brief that the income appropriated for the purposes of the general railroad contingent fund is not devoted to the assistance of the weak carriers.

POINT II.

The income-appropriation provisions cannot be sustained as a regulation of rates.

The provisions of paragraphs (2), (3) and (4) of Section 15-*a* undoubtedly constitute a regulation of rates in that they direct that rates be made upon a group basis, that they be calculated to produce a certain standard of net railway operating income and that the transportation needs of the whole country be considered. But the present question concerns, not the above cited paragraphs, but paragraphs (5) and (6) *et seq.*—the income-appropriation provisions.

(a) Considering the income-appropriation provisions as attempted rate regulation, on the theory of a seizure of the proceeds of rates impliedly declared to be unreasonable, they are void because of their want of due process of law, in that the amount of net income is arbitrarily made the sole and conclusive measure of the unreasonableness of the rates.

It has been argued by the advocates of these provisions that the *group rates* made by the Commission under the direction of paragraphs (2) to (4) might be considered as merely tentative, as far as each individual carrier is concerned, until the net railway operating income realized by such carrier from said rates is known and that if and when it develops that such income exceeds a 6 per cent. return, the excess may be considered as never having become the absolute property of the carrier but as having been allowed to come

into its possession only conditionally or impressed with a trust, because such excess was the product of rates which were *pro tanto* unreasonable *ab initio*.

There is nothing "tentative" in character about the rates prescribed by the Commission under Section 15a. The attempt to create a tentative status concerns only the net railway operating income.

But it is unnecessary to the theory above stated to characterize the rates as "tentative" or the receipt and possession of the earnings as "conditional" and as "in trust" or their recovery as a "recapture". These terms are used merely to add color to the picture. If rates are unreasonable, the unreasonable portion has always been recoverable from the carrier after its collection of the charges, even at common law. They are, and always have been, unlawful exactions in so far as they exceed what is reasonable. All that it is necessary to read into these paragraphs to carry out the theory invoked for their support, as far as the essential principle of the theory is concerned, is a declaration that, notwithstanding the rates have been prescribed by the Commission as reasonable for the group, they shall be deemed unreasonable as to a particular carrier to the extent that the carrier earns therefrom a return exceeding 6 per cent. That is absolutely all there is to this theory. The fact that Section 15a contains no express declaration to the foregoing effect will be considered under a subsequent subheading hereof. But, assuming that the section is to be construed as embodying by implication a declaration that the group rates shall be deemed un-

reasonable and excessive as to a particular carrier to the extent that the carrier derives therefrom a return in excess of 6 per cent., the question is presented whether such attempted rate regulation is within constitutional limits.

The showing of inadequacy of return on the property used in the public service is not the sole ground of complaint available to the carrier against governmental action, adopted under the guise of rate regulation. The power to regulate rates must not be exercised in an arbitrary and unreasonable manner, and an exercise of alleged rate regulation may be so arbitrary and unreasonable as to transcend the power of Congress, regardless of the fact that from the entire body of rates the carrier derives an adequate return upon its property. The foregoing proposition is established by the following decisions, without attempting to make the citations on this point exhaustive.

The case of *Northern Pacific Railway Co. v. North Dakota*, 236 U. S. 585, concerned a law fixing maximum intrastate rates on coal in carloads. The evidence based on a year's trial of the rates showed that, with proper allocation of expenses to this traffic, the Northern Pacific derived in the year a net profit of only \$847 from this coal traffic out of a total revenue of \$58,953 from such traffic, which this Court considered so small as to be nominal and non-compensatory. The State Court had held it necessary to be shown in order to invalidate this coal rate, that any deficit under the coal rate reduced the net of all intrastate freight earnings

to a point where they were insufficient to afford an adequate return on the property. This Court said at pages 595 and 596: "The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. *In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain.* Thus, in *Lake Shore & Michigan Southern Ry. v. Smith*, 173 U. S. 684, the regulation as to the sale of mileage books was condemned as arbitrary without regard to the total income of the carrier. Similarly, in *Missouri Pacific v. Nebraska*, 217 U. S. 196, it was held that the carrier could not be required to build mere private connections, and the adequacy of the receipts

"from its entire business did not enter into the question.
 "And this was so because the obligation was not involved
 "in the carrier's public duty and the requirement went
 "beyond the reasonable exercise of the State's pro-
 "tective power." And at page 598: "The State insists
 "that the enactment of the statute may be justified as
 "a 'declaration of public policy'. In substance, the argu-
 "ment is that the rate was imposed to aid in the develop-
 "ment of a local industry and thus to confer a benefit
 "upon the people of the State. * * * But, while
 "local interests serve as a motive for enforcing reason-
 "able rates, it would be a very different matter to say
 "that the State may compel the carrier to maintain a
 "rate upon a particular commodity that is less than
 "reasonable, or—as might equally well be asserted—to
 "carry gratuitously, in order to build up a local enter-
 "prise. That would be to go outside the carrier's under-
 "taking, and outside the field of reasonable supervision
 "of the conduct of its business, and would be equivalent
 "to an appropriation of the property to public uses upon
 "terms to which the carrier had in no way agreed. It
 "does not aid the argument to urge that the State may
 "permit the carrier to make good its loss by charges for
 "other transportation. If other rates are exorbitant,
 "they may be reduced. Certainly, it could not be said
 "that the carrier may be required to charge excessive
 "rates to some in order that others might be served at
 "a rate unreasonably low." And at pages 599 and 600:
 "Frequently, attacks upon state rates have raised the
 "question as to the profitableness of the entire intrastate

"business under the State's requirements. *But the decisions in this class of cases (which we have cited in the margin) furnish no ground for saying that the State may set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate.*" And finally at page 601: "It has repeatedly been assumed in the decisions of this court, that the State has *no arbitrary power over the carrier's rates* and may not select a particular commodity or class of traffic for carriage without reasonable reward."

See also: *Lake Shore & Michigan Southern Railway Co. v. Smith*, 173 U. S. 684, the bearing of which on the present point is not affected by its overruling in part by *Pennsylvania R. R. Co. v. Towers*, 245 U. S. 6. *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1. *Norfolk and Western Railway Co. v. West Virginia*, 236 U. S. 605. *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433. *Southern Railway Co. v. St. Louis Hay Co.*, 214 U. S. 297. *Chicago, Milwaukee & St. Paul Railroad Company v. Wisconsin*, 238 U. S. 491, which although not strictly a case of rate regulation, was so closely related to such regulation as to be pertinent here. *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 109.

In some of the cases above cited no discussion occurred of the adequacy of the return of the carrier from its entire business, but in each of them it is clear

that the principle of arbitrary action on which the case was decided would have rendered any showing as to the adequacy of the whole return entirely irrelevant.

The foregoing cases establish that, regardless of the adequacy of the percentage of return upon the whole business, attempted rate regulation will be held void if it is arbitrary and unreasonable. Considering, then, the income-appropriation provisions as implying a declaration that the rates prescribed by the Commission for a group shall conclusively be deemed unreasonable as to a carrier which derives a greater return therefrom than 6 per cent., we submit that such a regulation would be void as lacking due process of law. No action conceivable under the guise of rate regulation could be more unreasonable and arbitrary than a declaration that rates concededly valid and reasonable as to average carrier, in prosperity or earning ability, of a group, and reasonable for the shipper to pay to such average carrier, shall *conclusively* be deemed unreasonable as to a carrier earning a greater return than that fixed as proper for the average carrier, and that the earning of such greater return shall be absolutely the *only evidence* considered, to the exclusion of every consideration and factor which from time immemorial have been judicially held pertinent upon an issue of the reasonableness of rates.

Legislative fiat cannot under our constitutional government accomplish this purpose. The attempt would square only with a system of government subject to no constitutional restraints. The carriers in engaging in

interstate commerce have subjected themselves to the power of Congress to regulate interstate commerce and that power of regulation includes the power to regulate their transportation rates. But the carriers have not subjected themselves to action, under the guise of rate regulation, which either so reduces their compensation as a whole as to amount to confiscation, or is otherwise so arbitrary and unreasonable as to be wanting in due process of law. We assert that a declaration that the amount of the net railway operating income, and that consideration alone, shall be conclusively determinative of the unreasonableness of rates would be so unreasonable and arbitrary on its face as to be void in conflict with the Fifth Amendment, quite independently of any question of confiscation.

Legislative action of this extreme type, in the exercise of the power to regulate commerce, is naturally so nearly unprecedented that few pertinent decisions are available. We think, however, that the following citations fully establish the proposition last above stated.

In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, there was involved the validity of a statute of Kansas defining public stock yards and regulating the charges thereof. The statute declared that any stock yard having an average daily receipt of a specified number of head of livestock should be deemed a *public* stock yard. The charges by public stock yards were fixed at 15 cents per head for cattle and other specified amounts for calves, hogs and sheep. Mr. Justice Brewer writing the opinion held that the public had acquired an interest

in the stock yards so that the business was subject to governmental regulation within the principle of *Munn v. Illinois*, 94 U. S. 113. The lower court (82 Fed. 850, 856) had found that the net income would be reduced by the state rates about 50% and that the reduced rates would yield a return of 5.3 per cent. on the value of the property, but the lower court was not prepared to hold that the statute was confiscatory and had therefore dismissed the bill. Mr. Justice Brewer suggested various reasons which might justify a distinction between the extent of the regulation applicable in the case of one who has voluntarily undertaken to perform a public service, like a common carrier, and that applicable to one who is not engaged in a public service but has merely devoted his property to a use in which the public has an interest, to which latter class the stock yards belonged. We do not understand, however, that his conclusion in the case was in any way dependent upon this distinction, but rather that he applied to the stock yards there involved what he considered to be the law applicable to those engaged in a distinctly public service. He said at page 95: "Pursuing this thought, we add that "the State's regulation of his charges is not to be measured by the aggregate of his profits, determined by the "volume of business, but by the question whether any "particular charge to an individual dealing with him is, "considering the service rendered, an unreasonable ex- "action. In other words, if he has a thousand transac- "tions a day and his charges in each are but a reason- "able compensation for the benefit received by the party

"dealing with him, such charges do not become unrea-
 "sonable because by reason of the multitude the aggre-
 "gate of his profits is large. The question is not how
 "much he makes out of his volume of business, but
 "whether in each particular transaction the charge is
 "an unreasonable exaction for the services rendered.
 "He has a right to do business. He has a right to
 "charge for each separate service that which is reason-
 "able compensation therefor, and the legislature may
 "not deny him such reasonable compensation, and may
 "not interfere simply because out of the multitude of
 "his transactions the amount of his profits is large. Such
 "was the rule of the common law even in respect to
 "those engaged in a quasi public service independent of
 "legislative action. In any action to recover for an
 "excessive charge, prior to all legislative action, who-
 "ever knew of an inquiry as to the amount of the total
 "profits of the party making the charge? Was not the
 "inquiry always limited to the particular charge, and
 "whether that charge was an unreasonable exaction for
 "the services rendered?" After quoting at length from
 the opinion in *Transportation Company v. Parkersburg*,
 107 U. S. 691, and the opinion of Lord Chancellor Sel-
 borne in *Canada Southern Railway Co. v. International*
Bridge Company, 8 Appeal Cases, 723, his opinion pro-
 ceeded at page 97: "The authority of the legislature to
 "interfere by a regulation of rates is not an authority
 "to destroy the principles of these decisions, but simply
 "to enforce them. Its prescription of rates is *prima*
 "*facie* evidence of their reasonableness. In other words,

"it is a legislative declaration that such charges are
"reasonable compensation for the services rendered, but
"it does not follow therefrom that the legislature has
"power to reduce any reasonable charges because by
"reason of the volume of business done by the party he
"is making more profit than others in the same or other
"business. The question is always not what does he
"make as the aggregate of his profits, but what is the
"value of the services which he renders to the one seek-
"ing and receiving such services. Of course, it may
"sometimes be, as suggested in the opinion of Lord
"Chancellor Selborne, that the amount of the aggregate
"profits may be a factor in considering the question of
"the reasonableness of charges, but it is only one factor,
"and is not that which finally determines the question
"of reasonableness. Now, the controversy in the Cir-
"cuit Court proceeded upon the theory that the aggre-
"gate of profits was the pivotal fact. To that the testi-
"mony was adduced, upon it the findings of the master
"were made, and in recognition of that fact the opinion
"of the court was announced. Obviously, as we think,
"in all this the lines of inquiry were too narrowly pur-
"sued." Mr. Justice Brewer then referred to the find-
ing that the charges made by this stock yard company
were no greater (and in many instances less) than
those of any other stock yard in the country and to the
fact that the charge made by the company per head of
live stock handled was so small as to suggest no extor-
tion. While concluding, therefore, that the lower court
had proceeded upon too narrow lines, as indicated in

the above quotations, the decision was rested upon another ground. It appeared that the Kansas City Stock Yards Co., party to this suit, was the only stock yard company to which the statute applied in view of its declaration that only those stock yards having an average daily receipt of a specified number of head of live stock should be deemed *public* stock yards. The statute was therefore characterized, page 103, as attempting a classification "between stock yards doing a large and those "doing a small business". And on this subject it was said, page 104: "Clearly the classification is based solely "on the amount of business done and without any reference to the character or value of the services rendered. "Kindred legislation would be found in a statute like "this: requiring a railroad company hauling ten tons or "over of freight a day to charge only a certain sum "per ton, leaving to other railroad companies hauling "a less amount of freight the right to make any reasonable charge; or, one requiring a railroad company "hauling a hundred or more passengers a day to charge "only a specified amount per mile for each, leaving "those hauling ninety-nine or less to make any charge "which would be reasonable for the service; or (if we "may indulge in the supposition that the legislature has "the right to interfere with the freedom of private contracts), one which would forbid a dealer in shoes and "selling more than ten pairs a day from charging more "than a certain price per pair, leaving the others selling "a less number to charge that which they deemed reasonable; or forbidding farmers selling more than ten

"bushels of wheat to charge above a specified sum per
 "bushel, leaving to those selling a less amount the privi-
 "lege of charging and collecting whatever they and the
 "buyers may see fit to agree upon. In short, we come
 "back to the thought that the classification is one not
 "based upon the character or value of the services ren-
 "dered but simply on the amount of the business which
 "the party does, and upon the theory that although he
 "makes a charge which everybody else in the same busi-
 "ness makes, and which is perfectly reasonable so far
 "as the value of the services rendered to the individuals
 "seeking them is concerned, yet if by the aggregation
 "of business he is enabled to make large profits his
 "charges may be cut down. The question thus pre-
 "sented is of profoundest significance. Is it true in this
 "country that one who by his attention to business, by
 "his efforts to satisfy customers, by his sagacity in dis-
 "cerning probable courses of trade, and by contributing
 "of his means to bring trade into those lines, succeeds
 "in building up a large and profitable business, becomes
 "thereby a legitimate object of the legislative scalping
 "knife?" And it was held that this statute did not
 embody a classification based upon inherent differences
 in the character of the business but was discrimination
 between persons engaging in the same class of business
 and based simply upon the quantity of business which
 each did and that therefore it was void as a violation
 of the equal protection clause of the Fourteenth Amend-
 ment.

The court was unanimous in its judgment. Mr. Chief Justice Fuller and Mr. Justice Peckham concurred in the opinion of Mr. Justice Brewer. The six remaining Justices, it is true, concurred only upon the ground that the statute was a violation of the equal protection clause and deemed it unnecessary to express an opinion whether the statute was unconstitutional upon the further ground that by its necessary operation it would deprive the stock yards company of its property without due process of law. It does not appear to us that this fact detracts from the weight of the decision as an authority bearing on the present question. The effect of paragraphs (5) and (6) of Section 15a, now under consideration, viewed as a rate regulation, is to attempt a classification for rate regulation of the same character as that condemned in the *Cotting* case. After prescribing for the Commission a rule of rate making on the group basis, the effect of this statute, as it is contended by its supporters, is to make the rates so prescribed unreasonable and unlawful as to those carriers which earn therefrom a return in excess of 6 per cent., while leaving the same rates reasonable and lawful for all other carriers, even as applied to the same traffic between the same points of origin and destination. The earning of a return in excess of 6 per cent. will depend largely upon the greater volume of business carried and so will be on all fours with the classification condemned in the *Cotting* case. To some extent the earning of such excess will be the result of other factors, such as more economical and efficient operation, and it

cannot be doubted that a classification based upon such factors and penalizing such greater economy and efficiency is more vicious than a classification based simply upon volume of business. The arbitrariness of such classification is emphasized when, as here, the classification is not for the purpose of determining rates for the future but is for the purpose of regulating for a past period the rates under which the carriers have conducted their business. It is true that, strictly analyzed, the decision in the *Cotting* case was based upon the violation of the equal protection clause of the Fourteenth Amendment. But the distinction between a denial of equal protection and a denial of due process is a shadowy one. While the spheres of protection afforded by the equal protection and due process clauses are not co-terminous, "the violation of one may involve at times the violation of the other". *Truax v. Corrigan*, 257 U. S. 312, 322. Considering that it is well established law that, in the exercise of its power to regulate rates, Congress may not act unreasonably and arbitrarily, we submit that the arbitrary classification here presented, for rate-regulation purposes, if this be deemed rate-regulation, amounts to a deprivation of property without due process of law. And, aside from the ground on which the decision in the *Cotting* case was definitely based, the reasoning of Mr. Justice Brewer, concurred in by the Chief Justice and Mr. Justice Peckham, upon the broader ground so commends itself by its logic and forcefulness as to be entitled to the weight of an actual decision of the Court.

In *Canada Southern Railway Co. v. International Bridge Co.*, English Law Reports, 8 Appeal Cases 723, the Judicial Committee of the Privy Council affirmed an appeal from the Court of Appeal of the Province of Ontario, Dominion of Canada. One question involved was the reasonableness of the charges imposed by the bridge company for the use of the bridge by railroad trains. It was considered that the statute governing the bridge left such charges to be fixed by the bridge company with no other limitation than that implied by law that the charges should not be unreasonable. Lord Chancellor Selborne said, page 731: "It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. * * * That being so, it seems to their Lordships that it would be a very extraordinary thing indeed, unless the legislature had expressly said so, to hold that the persons using the bridge could claim a

"right to take the whole accounts of the company * * *
 "to ask a Court to say that the persons who have pro-
 "jected such an undertaking as this * * * are to
 "be regarded as making unreasonable charges, not be-
 "cause it is otherwise than fair for the railway company
 "using the bridge to pay those charges, but because the
 "bridge company gets a dividend which is alleged to
 "amount, at the utmost, to 15 per cent. Their Lord-
 "ships can hardly characterize that argument as any-
 "thing less than preposterous." It is pertinent to com-
 ment that the references in the above quotation to the
 possibilities of the legislature expressly so directing, of
 course contemplated a legislature not subject to the
 constitutional limitations which restrict the action of
 the Congress of the United States.

The complementary proposition that the inability of
 the carrier to make a profit from reasonable rates does
 not justify it in charging unreasonable rates is fully
 recognized and established. The two propositions stand
 together. If the rates are reasonable from the stand-
 point of the value of the service, they cannot be reduced
 simply because the carrier realizes a large profit there-
 from and they cannot be increased simply because the
 carrier is unable to realize a profit therefrom.

In *Covington Turnpike Co. v. Sandford*, 164 U. S.
 578, the Turnpike Company resisted tolls prescribed by
 the State legislature as unreasonable and unjust to the
 company and its stockholders in that the resulting reve-
 nue was insufficient for the upkeep of the roads and
 for dividends. This court said, at page 596: "But

"that involves an inquiry as to what is reasonable and
 "just for the public. If the establishing of new lines
 "of transportation should cause a diminution in the
 "number of those who need to use a turnpike road, and,
 "consequently, a diminution in the tolls collected, that
 "is not, in itself, a sufficient reason why the corporation
 "operating the road should be allowed to maintain rates
 "that would be unjust to those who must or do use its
 "property. The public cannot properly be subjected to
 "unreasonable rates in order simply that stockholders
 "may earn dividends. * * * If a corporation cannot
 "maintain such a highway and earn dividends for stock-
 "holders, it is a misfortune for it and them which the
 "Constitution does not require to be remedied by im-
 "posing unjust burdens upon the public."

In *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, this Court said, at page 409: "They who invest
 "their money in railroads take the same chances that
 "men engaged in other business do of making profit
 "from the carrying on of their business; and, as ap-
 "pears from other cases submitted to us with this, some
 "of the railroads in the State of Texas have been
 "operated at a constant loss. But such possibilities of
 "loss are simply the natural results of all business freely
 "carried on, against which the law is powerless to afford
 "protection."

Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, at page 549, the Court said:
 "But whether the carrier earned dividends or not sheds
 "little light on the question as to whether the rate on a

"particular article is reasonable. For, if the carrier's "total income enables it to declare a dividend, that "would not justify an order requiring it to haul one "class of goods for nothing, or for less than a reason- "able rate. On the other hand, if the carrier earned no "dividend, it would not have warranted an order fixing "an unreasonably high rate on such article."

In *Hooker v. Interstate Commerce Commission*, 188 Fed. 242, the Commerce Court reviewed an order of the Commission fixing certain rates, the petitioners in the suit being shippers who complained that the rates were extortionate. One of the carriers participating in the traffic was the Cincinnati, New Orleans and Texas Pacific Railway Co. The case against the rates was almost entirely based upon the large earnings of that road. It was alleged that if the rates fixed by the Commission had been applied during the preceding five-year period the average net earnings of that road on its capital stock would have been over 40 per cent. The Commission, however, had held that it was not at liberty to fix rates solely with reference to the C. N. O. & T. P., but must fix them with reference also to other companies which would necessarily be affected, that it should establish rates which were just and reasonable for the *section* in which they prevail. The Commerce Court said at page 251: "It appears from the findings of the "Commission that it has always refused in the consid- "eration of the reasonableness of a rate or rates to con- "sider only the particular carrier making the same by "itself, but on the contrary has always considered the

"rates in a particular territory or the rates of other
"carriers to be affected by the change of the particular
"rate or rates in question; and we think it fair to say
"that, so far as the Commission is concerned, there has
"been a uniform policy, public policy if you please, be-
"cause the Commission represents the United States in
"so far as it acts within the scope of its delegated au-
"thority in the establishment of reasonable and just
"rates, to the effect that it will not fix rates or determine
"their reasonableness solely upon a consideration of the
"particular carrier whose rates are directly involved.
"We think this court may take judicial knowledge of
"the fact that the interstate rates prescribed for the
"transportation of freight by common carrier must nec-
"essarily be more or less interdependent, or at least be
"so related to each other that the rate-making power
"will not, simply because it has the power, fix a rate
"upon a single line of railroads which will necessarily
"disorganize established and reasonable rates on other
"railroads in the same territory." And it was further
said, page 253: "The Commission found that the rates
"complained of were not clearly excessive. Much less
"are we able to find that the rates authorized by the
"Commission in the order complained of and which
"were a reduction of the former rates are clearly ex-
"cessive. In making this statement we are fully aware
"of the allegation of the bill as to the net earnings of
"the C. N. O. & T. P., and the whole case as to the ex-
"cessive feature of the rates fixed by the Commission
"is almost entirely based upon the earnings of the C.,

"N. O. & T. P. While earnings may be considered in
 "the fixing of a reasonable rate to be charged by a car-
 "rier for the transportation of freight, rates necessarily
 "cannot be based upon earnings alone. This is made
 "clearly to appear when we consider that a just and rea-
 "sonable rate is one which is just to the carrier and to
 "the shipper. It is a rate which yields to the carrier a
 "fair return upon the value of the property employed in
 "the public service, and it is a rate which is fair to the
 "shipper for the service rendered; and when this rate is
 "established, if it results in large profits to the carrier,
 "the carrier is fortunate in its business, and if it results
 "in a loss of earning power so that the business of the
 "carrier is unprofitable the carrier is unfortunate. But
 "the rate may not be lowered or raised merely upon the
 "ground that the carrier is either making or losing
 "money, providing always the rate is a reasonable and
 "just rate. Indeed, it has been held that the earning
 "power of the rate is one of the least considerations in
 "fixing a just and reasonable rate."

Receivers and Shippers Association v. Cincinnati, New Orleans and Texas Pacific Railway Company, 18 I. C. C. 440, was the decision of the Commission reviewed by the Commerce Court in the *Hooker* case above cited. The Commission's report states that since 1899 the C., N. O. & T. P. had paid the stipulated rental for a line leased by it and had shown very handsome returns from operation as well, that the property was unique among railroads in the south, that its gross earnings per mile for the year 1907 were over \$26,000, being

more than the average gross of the railroads in any group in the United States, that its grades were heavy and cost of operation and maintenance high but that nevertheless its net earnings had for several years reached \$7,000 per mile. The Commission said, page 461: "If it is our duty to take this railroad by itself and "to determine the reasonableness of these rates by a "reference to cost of construction, cost of maintenance, "and profit upon the investment, we think the com- "plainants have established their case and that these "rates ought fairly to be reduced * * *." And further at page 462: "The defendants also contend that "these rates should be fixed not only with reference to "the financial results and the financial necessities of the "Cincinnati, New Orleans & Texas Pacific Company, "but also with reference to other companies whose rates "are necessarily affected by these; otherwise stated the "Commission should establish rates which are just and "reasonable for the section in which they prevail; if a "particular company is so situated that it can make a "handsome profit under such rates, that is the good for- "tune of that company just as it would be the misfor- "tune of some other company if it could not show as "favorable earnings." And the Commission held that considering the interests of the whole territory there was no occasion for a wide-spread reduction in rates and that the rates themselves were not clearly excessive. A slight reduction was made, but substantially the relief sought by the complainant was denied.

In *Railroad Commissioners of Iowa v. Illinois Central Railroad Company*, 20 I. C. C. 181, the State Board of Railroad Commissioners complained of the charges made for the carriage of passengers over the Dubuque-East Dubuque Bridge by the Illinois Central controlling the bridge. It appeared that the net earnings of the bridge were about 20 per cent. on its original cost, although the Commission considered that a part of this profit was merely bookkeeping. The Commission said, page 186: "But the fact that the net revenues of the Illinois Central from its ownership of the bridge, when so estimated, may be greater than the returns on ordinary business enterprises is not sufficient in itself to justify a holding that the bridge tolls are excessive. * * * The net revenues have an undoubted and often an important bearing upon the question of the reasonableness of rates, but the value of the service to the shipper and the other elements so often referred to as entering into the reasonableness of rates must also be taken into consideration. In this connection *Canada Southern Railway Co. v. International Bridge Co.*, 8 App. Cas. 731, is not without interest. A railroad company may be operated with a less return than it ought to enjoy or even at a loss, but neither condition of affairs would justify the exaction by it of rates that are higher than they reasonably should be for services performed, all things being considered. So also the fact that the net earnings of a carrier may be large does not of itself justify us in fixing a rate at less

"than is reasonable for the service, all other things being considered."

It has been recognized by the courts and the Interstate Commerce Commission that a rate may not be confiscatory, that is, so low as to amount to a taking of the carrier's property without just compensation, and yet not constitute a reasonable rate in the sense of yielding an adequate compensation; in other words, that the terms "just and reasonable" are not synonymous with "non-confiscatory". *Union Pacific Railroad Co. v. Kansas Public Utilities Commission*, 95 Kas. 604; *Railroad Commission of Texas v. Houston Texas Central Railroad Co.*, 90 Texas, 340; *Detroit and Mackinac Railway Co. v. Michigan Railroad Commission*, 171 Mich. 335; *Louisiana Railway & Navigation Co. v. Railroad Commission*, 131 La. 387; *Minneapolis, St. Paul & S. Ste M. Ry. Co. v. Wisconsin Railroad Commission*, 136 Wisconsin, 146; *Trier v. Chicago, St. Paul M. & O. Ry. Co.*, 30 I. C. C. 352, 355; *Holmes & Hallozwell Co. v. Great Northern Railway Co.*, 37 I. C. C. 627, 635.

In *Investigation and Suspension Docket No. 26*, 22 I. C. C. 604, the Commission said at page 624:

"We may not say that a rate shall be fixed so as
 "to meet the requirement or needs of any body of
 "shippers in their efforts to reach a given market, nor
 "may we establish rates upon any articles so low that
 "they will not return out of pocket cost. Neither could
 "we fix an entire schedule of rates which would yield
 "an inadequate return upon the fair value of the prop-

"erty used in the service given. There is, however, a
 "zone within which we may properly exercise 'the flex-
 "ible limit of judgment which belongs to the power to
 "fix rates.' These are the words of the Chief Justice of
 "the Supreme Court, 206 U. S. 26. There is no flexible
 "limit of judgment if all rates must be upon a level of
 "cost, and out of every dollar paid to the carrier must
 "come a fixed amount of return for capital invested.
 "The recognition of such a doctrine has never been sug-
 "gested either by Congress or the Supreme Court. A
 "just and reasonable rate must be one which respects
 "alike the carriers' deserts and the character of the
 "traffic. * * * The words 'just and reasonable' imply the
 "application of good judgment and fairness, of common
 "sense and a sense of justice to a given condition of
 "facts. They are not fixed, unalterable, mathematical
 "terms. Their meaning implies the exercise of judg-
 "ment and against the improper exercise of that
 "judgment the Constitution gives protection, at least as
 "far as the carriers are concerned."

(b) But the income-appropriation provisions do not pur-
 port to be and are not a regulation of rates.

The whole argument under sub-heading (a), above,
 is upon the assumption, indulged for the purpose of
 argument, that the provisions for the disposition of the
 net railway operating income in excess of six per cent.
 on the property value can be construed as a regulation
 of rates by reading into, or implying from, those pro-
 visions a declaration that the rates made by the Com-

mission for a group are unreasonable as to any carrier earning therefrom a net railway operating income over 6 per cent. But the provisions in question do not purport to be a regulation of rates and cannot reasonably be construed as such.

The rate regulation is confined to paragraphs (2) to (4) of Section 15a, wherein the rule of rate-making on the group basis is prescribed and the mandate given the Commission to take into consideration the transportation needs of the whole country in fixing the rate of fair return for the groups, etc. Paragraph (5) then, by way of recital, states the opinion that under any rates sufficient to sustain the carriers as a whole some carriers will realize a return "substantially and unreasonably in excess of a fair return", and follows such recital with a provision that the "part of such excess, as hereinafter prescribed," shall be held in trust for and paid over to the United States. This paragraph does not contribute any support to the theory of rate regulation. Its conclusion, or substantive provision, is at most an assertion of a claim in favor of the Government to any excess railway income over a "fair return". Its recital merely explains why the claim is asserted and attempts to justify the claim. The whole paragraph is nothing more than an introduction for paragraph (6). Paragraph (6) provides in brief that any carrier realizing a net railway operating income in excess of 6 per cent. upon its property value shall hold one-half of the excess as a reserve fund for purposes specified in subsequent paragraphs and pay over to the Commission the remain-

ing half of the excess. It is clear that the provision as to income in excess of 6 per cent. is not inferentially a declaration that 6 per cent. on property value is the measure of a "fair return". The percentage of property value constituting a "fair return" is by paragraph (3) definitely prescribed by Congress itself as $5\frac{1}{2}$ per cent. for the first two years, with discretion to the Commission to increase it to 6 per cent. to provide for improvements chargeable to capital account. By the same section the percentage constituting a "fair return" after the expiration of the first two years is to be determined by the Commission. The 6 per cent, adopted for the purpose of paragraph (6) is therefore a fixed basis, arbitrarily selected as a matter of convenience, which may or may not correspond to the "fair return" ascertained as provided in paragraph (3). Congress, while itself prescribing the "fair return" for the first two years and directing the Commission to determine it thereafter, has not undertaken to dispose of *all* net railway operating income in excess of such fair return, but only, in the language of paragraph (5), "such part of the excess, as hereinafter prescribed." The section contains no express declaration that the rates prescribed for a group shall be deemed unreasonable to the extent that they have produced net railway operating income in excess of the $5\frac{1}{2}$ per cent. prescribed as a "fair return" for the first two years, or in excess of such rate as the Commission shall allow as a "fair return" thereafter. It contains no express declaration that the group rates shall be deemed unreasonable to the extent that

they produce a net railway operating income in excess of the 6 per cent. rate used for the purposes of paragraph (6). There is no justification for implying any such declaration. It would be clearly unjustifiable to imply a declaration that the rates were unreasonable to the extent that they produce an income in excess of the "fair return" fixed under paragraph (3), for the omission of Congress to attempt to appropriate or dispose of the whole of that excess is evidently a concession by Congress of the propriety of a carrier retaining *some* net earnings in excess of what is determined to be in the strict sense a "fair return". There remains, as an argument that the income-appropriation provisions constitute rate regulation, only that, since Congress has undertaken to appropriate or control the disposition of the railway income in excess of 6 per cent., it must be inferred that this portion of the railway income in excess of a "fair return" was considered by Congress as "substantially and unreasonably in excess of a fair return", in the language of the recital in paragraph (5), and that therefore there should be implied a declaration that the rates prescribed for the group to the extent that they produce a return in excess of 6 per cent. are unreasonable. But such argument cannot prevail for the reasons and considerations hereinafter stated.

The body of rates for the group which the Commission is directed by paragraph (2) to prescribe is expressly recognized as made or to be made "in the exercise of its power to prescribe just and reasonable rates." The body of rates so prescribed will constitute

the lawful rates and the only lawful rates for the use of every carrier of the group. There will attach to them as complete and conclusive sanction as to reasonableness as if they had been specifically named in an Act of Congress.

The body of rates so prescribed under paragraph 2 must necessarily be reasonable, judged as a whole, for the average carrier of the group—average as to earning capacity, operating cost and property value—for this is in effect the premise of the rate structure of the group. If the rates are reasonable for the average carrier of the group, it is an irresistible conclusion that they are reasonable for all carriers in the same group, including any carrier which is able to realize a net railway operating income constituting a greater percentage, than the average, of its property value.

In *Proposed Advances in Freight Rates* (1903), 9 I. C. C. 382, the Commission said at page 425: "The transportation charge must be the same by all routes. "Whatever rate is made on grain from Chicago to New York by the Vanderbilt System must determine the rate between that point and the Atlantic Seaboard by all routes. Since the fixing of a rate upon that system indirectly determines what that charge shall be upon all other roads, should we, by reason of this indirect effect, consider the condition of those roads? It might be manifestly unfair to select a single advantageous line and make that the standard. We have seen that grain can be transported under actual conditions by the Lake Shore and the New York Central Railroads from

"Chicago to New York at a cost less than that by most other routes. It would be hardly just to these other routes to compel the putting in of a rate upon that line which was reasonable with respect to it alone and which had no reference to its competitors. Upon the other hand, it would be equally unfair to the public if the most expensive line were made the standard."

In *City of Spokane v. Northern Pacific Railway Co.*, 15 I. C. C. 376, the Commission held that the reasonableness of a rate between two points served by two or more carriers could not be determined by consideration alone of that line which is shortest and most favorably situated as to operations, earnings, etc., but that the entire situation must be considered (see particularly pp. 392 to 394).

This principle was reaffirmed in *Kindel v. New York, New Haven & Hartford Railroad Co.*, 15 I. C. C. 555, 561, 563. Referring to the three cases above cited in *Receivers and Shippers Association v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 18 I. C. C. 440, the Commission said at page 464: "We have no doubt as to the correctness of this principle and believe it must be applied here within proper limits."

In *Advances in Rates* (1911), 20 I. C. C. 243, considering what roads should be taken as the standard in the determination of rates in official classification territory, the Commission concluded that the Pennsylvania, New York Central and Baltimore & Ohio systems should all be used and said (p. 274): "In 9 I. C. C. Rep. 382,

"this Commission considered the justice of certain advances in grain rates between Chicago and the Atlantic seaboard and it there held that whatever rate might reasonably be imposed upon these three systems must be held to be a reasonable charge for that service by all lines. We hold to the same view in this investigation. We do not mean that other lines should not be considered, but that these systems may be taken as typical. Under rates reasonable for these three systems there may be lines whose earnings will be extravagant, but that is their good fortune. There may be lines which cannot make sufficient earnings, but that is their misfortune. We ought not to impose upon this territory, for the purpose of allowing these defendants additional revenues, higher rates than are adequate to these three systems considered as a whole."

Section 15a contains nothing from which it is justifiable to infer that Congress deemed that the rates fixed with particular reference to the average or typical carrier of the group become unreasonable in the case of a carrier able to realize more than a "fair return" or more than a 6 per cent. return. The appropriation of a part of the excess over a 6 per cent. return and the assumption of control over the balance of that excess does not justify an inference that Congress deemed the rates producing that part of the net railway operating income unreasonable but is absolutely consistent with an entire concurrence by Congress in the view of the Commission, shown in the cases above cited, that the rates fixed with reference to the average or typical carrier are just and

reasonable for all carriers in the territory. All that the provision for appropriating and controlling the disposition of a part of the railway income necessarily indicates is that Congress deemed such income excessive, or as greater than it was willing to allow the carrier to retain, however just and reasonable might be the rates under which it was earned.

There is no provision for a determination by the Commission that the body of rates prescribed for the group is unreasonable as to the carrier realizing an excess over 6 per cent. It would seem that if the intention had been to adopt these provisions as *rate regulation* there would have been inserted a provision for such determination by the Commission as a condition precedent to the recovery by the Government of the excess resulting from rates believed to be unreasonable. Due regard for constitutional procedure would seem to have dictated such a provision. Section 15a is interjected into the Interstate Commerce law as a component part of that law. The provisions of that law (Sec. 15) for the investigation of rates and the adjudication by the Commission of their unreasonableness still stand. The right of the shipper to complain of unreasonable rates and recover reparation has not been taken away, although it may be reduced or limited to the extent that rates in the future are prescribed by the Commission, rather than initiated by the carrier. It is provided in paragraph (17) of Section 15a that the provisions of this section shall not be construed as depriving shippers of their right to reparation but that they shall not be

entitled to reparation on the ground that any particular rate reflects an excess over 6 per cent. recovered by the Government. This expressly saves the former reparation right and merely denies it any enlargement by reason of paragraphs (5) and (6) of Section 15a. This denial to the shippers of a right to assert that rates are unreasonable because they produce a return in excess of 6 per cent. stands in direct opposition to any inference that Congress intended to declare the rates unreasonable to the extent that they produce an income in excess of 6 per cent.

It might occur, in the case of any body of rates prescribed by the Commission for a group that every rate composing that body of rates had been passed upon by the Commission, at the instance of complaints by shippers, and held to be just and reasonable. There is certainly nothing in the law to prevent complaints by shippers as to each and every rate composing the body of rates prescribed for a group and it might well be that over a period of years substantially all of such rates would be separately passed upon by the Commission and adjudged to be just and reasonable. Paragraph (2) expressly reserves to the Commission the power to consider the justness and reasonableness of particular rates prescribed as a part of the body of rates for a group. Nevertheless this law purports to operate as fully in such a case as in any other cases and to take for public purposes the excess earned by the carrier over 6 per cent. This consideration is conclusive against any inference of a declaration by Congress that the rates

producing an income in excess of 6 per cent. are *pro tanto* unreasonable.

In these provisions no distinction has been made between earnings from interstate and earnings from intrastate business. Congress has assumed to appropriate and control the disposition of net railway operating income in excess of a 6 per cent. return realized from the entire business of the carriers. Suppose that a carrier earns from its interstate business, exclusively, a net railway operating income of 5 per cent. If its net railway operating income derived from its intrastate business does not exceed one per cent., its entire income is not affected by these provisions of the statute. But, if from its intrastate business it realizes more than one per cent. of net railway operating income, there will be an excess subject to appropriation and control under the provisions of this law. This consideration presents an additional and very serious obstacle to any theory that these provisions of the law should be construed as a declaration that the rates producing the statutory excess of railway income are *pro tanto* unreasonable, for the rates producing such income are in part intrastate rates, over which Congress has control only to a limited extent and under special conditions. It is well settled that the earnings under interstate rates may not be used in determining the adequacy of the return from intrastate business. *Smyth v. Ames*, 169 U. S. 466, 541.

It seems clear, therefore, beyond the possibility of a doubt, that Congress by these provisions had no intention of condemning as unreasonable the rates producing

a so-called excess income, but that, having required the making by the Commission of rates on a specified basis, it regarded the rates, when so fixed, as reasonable for shippers to pay to all carriers of the group and as reasonable *per se* for all the carriers to apply, and simply sought to prevent the enjoyment of railway incomes which it regarded as excessive by the direct and straightforward method of declaring that the excess belonged to the Government and requiring it to be paid to the Government. In so doing Congress undoubtedly proceeded in the hope that it would be held to be acting within its power to *regulate commerce*, on the theory that the regulation of the incomes of interstate carriers was within that power. The Committee reports show that question had been seriously raised as to the constitutionality of such action. But that Congress believed that it was, by these provisions for the disposition of railway operating income, exercising the power of regulating rates, or intended to invoke this power to sustain its action, there is not the slightest evidence or indication to be discovered in the Act.

(c) To construe the income-appropriation provisions as a regulation of rates would do violence to the whole theory upon which rate regulation rests.

The right of government to regulate the charges for the use of properties impressed with a public trust *rests upon the theory that without such regulation the owner may exact from the individual patrons unreasonably high rates*. In *Lake Shore & Michigan Southern Ry.*

Co. v. Smith, 173 U. S. 684, at page 698, this Court said: "The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling and using their property in a manner in which the public have an interest". See also the exhaustive discussion of the origin of this power in *Munn v. Illinois*, 94 U. S. 113, 125-130, 133-4. *The power to regulate rates, therefore, does not rest upon the theory that without such regulation the owner may enjoy an unreasonably large net income.* The origin and purpose of the regulation was the protection of the individual users and not the regulation of the net income of the owner.

Future charges to be paid by individual patrons of a railroad are in no wise affected by the income-appropriation provisions. Under the rates prescribed or approved by the Commission for a rate-making group, the patrons of the road or roads in that group whose income is sufficient to become subject to appropriation under this statute, as well as the patrons of those roads in the group whose income is not subject to appropriation, pay the same rates.

Neither are the charges paid by shippers for past transportation service affected by the income-appropriation provisions. These provisions are not a device by which the patrons of prosperous roads recoup charges paid by them, upon the theory that, as to the services performed by such roads, such charges were unreason-

able. By paragraph (17) of Section 15a it is provided that no shipper shall be entitled to recover reparation upon the sole ground that any particular rate may reflect a proportion of "excess income" payable by the carrier to the Commission. The necessity for this restriction is obvious, for manifestly any attempt to distribute amounts of income appropriated among the shippers who had contributed to that income not only would have been unworkable, but would have defeated the express intent of the Act to maintain uniform rates upon competitive traffic.

The income-appropriation provisions therefore are not a regulation of rates for the future, for the rates to be charged in the future are not affected by these provisions. They are not a regulation of rates charged in the past, through providing a means of making reparation to shippers for rates, assumed to have been excessive, collected from them in the past, for reparation based upon these provisions is expressly denied. They are not within the scope of the historical origin and purpose of rate regulation, or within the limits of rate regulatory powers as understood from the earliest days of common law to the present time, for they do not affect the rates paid by the public, for the future or in the past. It follows necessarily that to construe these provisions as a regulation of rates would do violence to the whole theory upon which rate regulation rests.

(d) The income-appropriation provisions do not acquire the character of a regulation of rates by reason of any interdependence between them and those provisions of the same section which are concededly a regulation of rates.

There is no essential connection, and no necessary interdependence, between the income-appropriation provisions and the rate regulating provisions of Section 15a. We have hereinbefore conceded that the provisions of paragraph (2), (3) and (4) of Section 15a constitute rate regulation. In enacting these rate regulation provisions, Congress had certain objects, namely: (1) to determine the rates to be paid by the public, having in view the transportation needs of the whole country and the necessity of enlarging transportation facilities; (2) to prescribe a method for fixing such rates, the group basis, which would produce revenue adequate to sustain the average roads and probably better the former condition of the weak roads of the group. Paragraphs (5) and (6) *et seq.* had as their object a third and entirely distinct object, namely, to prevent the better-than-average carrier of a group from retaining net income realized from the rates prescribed under the new rule of rate-making in excess of a rate of return fixed by the Act. The first two objects were effected by provisions which concededly have the character of a regulation of commerce. But this cannot be said of the legislation designed to accomplish the third object. Net income of a carrier, although due in part to interstate commerce business, arises after the act of interstate

commerce has been completed. The power to regulate interstate commerce does not persist after such commerce has become a *fait accompli*, and extend to the regulation of the net income derived in part from such commerce. Apprehending an argument of the character just indicated against the power of Congress to accomplish the third object, an effort was made, apparent on the face of the Act, to indicate that the seizure of incomes of carriers in excess of the standard defined is an essential part of an interdependent scheme of rate making. But the effort to establish an essential connection or necessary interdependence between the parts of this section which constitute a regulation of interstate commerce and the part which is not a regulation of such commerce cannot succeed. The regulation of the income of certain carriers by the appropriation of a part of their income will not affect the rates to be paid by the public. The operation of the group plan of rate making, as a means of sustaining the average carriers and bettering the condition of the weak roads, is likewise not affected by the existence or operation of the plan to appropriate a part of the income of the stronger carriers. All that part of Section 15a which is concerned with the rates to be paid by the public and with the adequacy of revenues to sustain the carriers, becomes effective and fulfills its designed purposes before and independently of the operation of the income-appropriation provisions. The omission of the income-appropriation provisions would not have changed the rates to be paid by the public or lessened or altered the designed

benefits to the average and the weak carriers from the group plan of rate making.

It is argued that a scheme of rate making, such as Congress sanctioned in this statute, which provides a living income for the average carrier in a group, will unavoidably afford the strong carriers a more than living income; that the people of this country might not be willing to acquiesce in such a method of making rates unless it were accompanied by an appropriation of the earnings of any carriers in excess of a living income; that the public which pays the rates of the strong carriers demands that such excessive earnings be appropriated by the general Government rather than left to be expended by the carriers, which serve the public, in the improvement of their service and enlargement of their facilities. The foregoing argument states the only conceivable theory of interdependence between the income-appropriation provisions and the rate-making provisions. The supposed attitude of the public may or may not have been correctly forecast. Even if the forecast were correct, there results no interdependence of these provisions which the law can recognize. The desirability of curtailing or controlling or directing the effect of the exercise by Congress of an express power is not sufficient to enlarge the powers of Congress. For example, if Congress should prohibit national banks from establishing branches, the fact that Congress or the public may deem it desirable that national banks should not in this respect be at a disadvantage in their

competition with state banks would not give Congress power to prohibit state banks from having branches.

The income-appropriation provisions are merely a recognition of the following fundamental economic facts: (1) that rates on competitive traffic must be the same for all roads participating; (2) that with the same level of rates competing lines will show varying rates of return upon their property values; and (3) that a level of rates necessary to maintain an efficient transportation service for all of such competitors combined may and probably will result in a rate of return for some carriers in excess of that which might be fixed for them alone as a reasonable rate of return. In undertaking to deal with such assumed excess, Congress was not engaging in rate regulation but simply in an effort to control the product of that regulation. The economic facts upon which the income-appropriation provisions rest existed long before this enactment, and, as evidenced by numerous decisions, cited above, have always been recognized by the Commission in the establishment of rates for competitive traffic under the general requirement of the law that the rates fixed shall be just and reasonable. Under rates thus fixed by the Commission the rate of return of certain carriers in the pre-war period exceeded 6 per cent., as shown by Senate Committee report to which reference has already been made. *If the appropriation of so-called excess income under the provisions of the present statute may be sustained as a regulation of rates or a regulation of*

commerce, then it is clear that it would have been competent for Congress, without providing the rule of rate-making enacted in Section 15(a), to have merely reaffirmed the requirement that all rates should be just and reasonable, left their determination to the Commission, and then provided that any carrier receiving in any year a net income in excess of 6 per cent. on the value of its property should divide such excess with the Government. Such an enactment would have been as much a regulation of rates or a regulation of commerce as is the existing statute. And this consideration is conclusive that there exists no interdependence in the eye of the law between the income-appropriation provisions and the rate-making provisions.

POINT III.

The income-appropriation provisions cannot be sustained as an exercise of the taxing power.

The Circuit Judges in the decision below sustained the provisions in question as an exercise of the power of taxation. After examining the purposes for which the income so appropriated from the carriers was to be used, and concluding that these purposes were purposes for which it would be legitimate for Congress to appropriate public funds, or to raise funds by taxation, the Court said, "While the exaction in question is not denominated a tax, it is in effect an excise tax, levied on

"all carriers subject to the Transportation Act, payable "from surplus earnings", and the Court quoted from the opinion of this Court in the *New England Divisions* case, as follows: "In other words, the additional revenues needed were raised partly by a direct, partly by "an indirect, tax". *Dayton-Goose-creek Railway Co. v. U. S.*, 287 Fed. 728, 732. The language so quoted by the Circuit Judges from the opinion in the *New England Divisions* case was a characterization of the method by which additional revenues were raised, partly by general rate increase, partly by adjustment of divisions. It was not a reference to the income-appropriation provisions of Section 15a, and, if it had been, this Court would not have intended thereby to prejudge any controversy as to the validity of these provisions considered as an exercise of the power of taxation.

This ground of decision was originated by the Circuit Judges themselves. It was not advanced or suggested by Counsel for the Government.

(a) The provisions in question do not purport to be an exercise of the power of taxation.

The Transportation Act 1920, of which these provisions are a part was throughout an exercise of the power to regulate Interstate Commerce. These particular provisions were a part of Title IV, which consisted wholly of amendments to the Interstate Commerce Act, and are a part of Section 15a added as a new Section to the Interstate Commerce Act. We have already pointed out that the primary purpose of new Section

15a was to establish a rule of rate-making which is embodied in paragraphs (2), (3) and (4) of said section. The provisions for the appropriation of a part of the net railway income are introduced by the language in paragraph (5), "Inasmuch as it is impossible (without "regulation and control in the interest of the commerce "of the United States considered as a whole) to establish uniform rates upon competitive traffic", etc. By the language quoted in parentheses Congress expressly labeled the provisions now in question as a regulation and control of commerce. This recital is followed by the declaration that any carrier receiving an income in excess of a fair return shall hold a part of the excess, thereafter prescribed, "as trustee for" the United States. This declaration, made for the purpose of providing a theory by which it was hoped the provisions for appropriating the net railway operation income could be sustained, is the direct opposite of the theory of taxation. It was an attempt to withhold title to the railway earnings from the carriers to the extent that they exceeded a rate prescribed and to divert the title thereto to the United States. Taxation, on the contrary, acknowledges the property to belong to the taxpayer and merely levies a contribution thereon for the purposes of government. Paragraph (6) of the same section provides that one-half of the excess of net railway operating income over 6 per cent. on the property value shall "be recoverable by and paid to the commission". Nowhere in paragraph (5) or paragraph (6) or the subsequent paragraphs dealing with this subject are the

terms "tax", "duty", or "excise" used. It is significant also that the income appropriated is not to be collected by the Treasury Department or administered by that department, but by the Interstate Commerce Commission.

The provisions regarding the one-half of the net railway operating income in excess of six per cent. not required to be paid over to the Commission, further evidence the intent of Congress to act under its commerce power. It is provided that one-half of such excess shall be placed in a reserve fund established and maintained by the carrier, which may be used by the carrier only for the purpose of paying dividends or interest or rent for leased roads to the extent that its net railway operating income for any year is less than six per cent. of its property value, and not for any other purpose. Paragraphs (6), (7) and (8). It is clear that Congress was assuming over the half of the net railway operating income of six per cent. allowed to be retained by the carriers the same dominion and power of control which it exerted as to the half required to be paid to the Commission; this dominion was asserted as to both halves under the power to regulate Interstate Commerce.

Therefore, to hold that the provisions for the appropriation of one-half of the net railway operating income in excess of six per cent. may be sustained as an exercise of the taxing power, is not only to disregard the express declaration of Congress as to the power under which it assumed to be acting, but is to sustain the regulation and control of one-half of the alleged

excess income upon a theory which cannot be advanced for sustaining the regulation and control of the remaining half of the alleged excess income.

A further consideration making against the theory of sustaining these provisions as a tax law is the existence at that time of a very burdensome excess profits tax law. There was then in effect the 1918 Revenue Act, approved February 24, 1919, which besides imposing upon all corporations an income tax of 10 per cent. for 1920 and subsequent years, imposed upon all corporations for those years an excess profits tax of 20 per cent. of net income in excess of the excess profits credit and not in excess of 20 per cent. of invested capital and 40 per cent. of the remaining net income, the excess profits credit being 8 per cent. of invested capital plus \$3,000. These taxes are deducted under the Commission's practice in determining railway operating income. If the part of net railway operating income appropriated by paragraph (6) were considered as a tax, it also would be deductible in ascertaining railway operating income, unless the Commission's practice is changed to differentiate this exaction from other taxes, or unless the complication were avoided by reading into the Act some qualification of the term "net railway operating income".

Again, the 1919 Revenue Act in providing for the ascertainment of taxable net income, for income and excess profits tax purposes, allowed the deduction from gross of all taxes paid under the authority of the United States except income, war-profits and excess-profits

taxes (Sec. 234(a) (3) of 1919 Revenue Act), and if the appropriation of income in paragraph (6) of Section 15(a) of the Commerce Act were sustained as an excise-tax, as held by the Circuit Judges, the amount paid by a carrier therefor would be deductible in its income and excess profits tax returns. This would present another embarrassing circle and complication, requiring for its solution a major operation in statutory construction.

(b) But even if the appropriation of income were labeled as a tax law it would be void because its real purpose, ascertainable from the Act itself, is the limitation of the amount of income which a carrier shall be entitled to retain, an object not within the power of Congress.

We submit that the proposition above stated, falls exactly within the principle of *Bailey v. Drexel Furniture Co.* (Child Labor Tax case), 259 U. S. 20, and *Hill v. Wallace* (The Future Trading Act Case), 259 U. S. 44.

In the *Child Labor Tax* case, there was involved a section of the Revenue Act of 1919 which purported to levy an excise tax of ten per cent. of the net profits of mines, quarries, mills and similar establishments, in which children under the age of fourteen years had been permitted to work. The act was carefully and definitely given the form of a tax law. It was, however, held invalid as being clearly, on its face, designed to penalize and thereby suppress the employment of child labor, the regulation of which is reserved by the con-

stitution exclusively to the States. This Court stated the question presented to be (p. 36): "Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?" Considering only the provisions of the Act itself, the Court concluded (p. 37): "In the light of these features of the act, a Court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable." The Court said further at page 37, "It is the high duty and function of this Court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the states." And at page 38, "Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us."

In the *Future Trading Act* case there was involved a tax, imposed by that name, of twenty cents a bushel

on contracts for the sale of grain for future delivery, unless the seller owned the grain at the time of sale, or owned or rented the land on which it was to be grown, or unless the contract were made by or through a member of a Board of Trade designated by the Secretary of Agriculture as a contract market, and the Secretary of Agriculture was authorized to designate contract markets only under various prescribed conditions calculated to prevent trading for the purpose of manipulation of prices or the cornering of grain. This Act was held invalid as being completely governed in principle by the Child Labor Tax decision. This Court said (259 U. S. at 66): "It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney-General." And again, at page 66: "The Act is in essence and on its face a complete regulation of boards of trade, with a penalty of twenty cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power."

While the two decisions above cited advert to the fact that the subject matter Congress there sought to

regulate, under the guise of its taxing power, was a subject matter reserved for the control of the states, this does not affect the application of those decisions to the present case. We have attempted to demonstrate under the preceding points of this brief that the object sought by Congress by the provisions embodied in paragraphs (5) and (6) of Section 15(a) was to regulate the incomes of carriers, and limit the amount of net income which a carrier shall be entitled to retain, not by the regulation of rates, but by a direct appropriation of a part of such incomes arbitrarily determined by Congress to be excessive and that the incomes so appropriated were not the product of rates determined to be unreasonable, but were in all respects the absolute property of the carriers. If we have succeeded in establishing the proposition that the real and primary object of Congress was to regulate incomes by a direct appropriation and seizure of a part of such incomes after they had become the property of the carriers, we have established an object which is within the power, *neither* of Congress *nor* of the state legislatures. No power to limit incomes exists in the states, except to the extent that it may be exercised in the initial grant of franchises and charters. The fact that a field of regulation within the power of the state legislatures was attempted to be invaded by the Child Labor Tax and the Future Trading Tax was not the controlling consideration in these cases. It was enough that the subject matter sought to be regulated was beyond any power of Congress. Where the subject matter, as in this case,

the limitation of incomes by arbitrary and direct appropriation, is withdrawn equally from the power of Congress and from the power of the States, exactly the same principle applies. This Court quoted in its opinion in the *Child Labor Tax* case at page 40 from the opinion of Chief Justice Marshall in *M'Culloch v. Maryland*, 4 Wheat. 316, 423, as follows: "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land."

We need not distinguish such earlier cases as *Veazie Bank v. Fenno*, 8 Wallace, 533; *McCray v. U. S.*, 195 U. S. 27, and *U. S. v. Doremus*, 249 U. S. 86, in which tax laws have been sustained against an attack alleging that they were enacted with another motive than taxation. These cases are explained and distinguished in the opinion in the *Child Labor Tax* case upon grounds which adequately distinguish them from the present case.

The parallel of the present case, considering the provisions for the appropriation of income as bearing a tax label, with the *Child Labor Tax* and *Future Trading Tax* cases is exact in principle. The facts, so far as they differ, lend added strength to the argument for the invalidity of the alleged or assumed tax in the present case, since in this case the provisions in issue are not

found in a revenue law and do not purport to be adopted under the taxing power. We are, however, disregarding this difference in facts for the purpose of the argument. The Court is not called upon in this case to speculate as to the ulterior motive of Congress or to search outside the terms of the Act itself for such motive. It appears on the face of the Act itself that its purpose was not to raise revenue, with only an incidental effect of limiting incomes, but that its purpose was the regulation of incomes deemed to be excessive in order to avoid public criticism of the rule of rate-making prescribed by Congress. This, as stated, is a subject matter not entrusted to Congress. If then the provisions in question purported to be an exercise of the taxing power, they would fall under the principle of this Court's condemnation of the Child Labor Tax as a pretended exercise of the taxing power which had passed beyond the bounds of that power and asquired predominant characteristics of regulation and punishment.

It follows, therefore, that even if the provisions for the appropriation of income had been characterized by Congress as an imposition of a tax, they could not have been sustained as an exercise of the taxing power.

(c) This appropriation cannot be sustained as a contribution imposed, incidentally to the commerce power, to create the fund called the general railroad contingent fund, as a burden which the industry should bear.

We recognize that Congress, without acting under its taxing power in the strict sense, may under its power

to regulate commerce exact reasonable contributions from carriers for purposes legitimately within the commerce power. We refer to the principle announced in the *Head Money Cases*, 112 U. S. 580, involving an Act of Congress providing for the collection from vessels of fifty cents for each passenger, not a citizen of the United States, transported to the United States from foreign ports, the proceeds to be used as a fund for the care of immigrants and for defraying the expense of administering the Immigration Act. The Court said, page 595, that the power exercised in that Act was not the taxing power, but an incident of the regulation of commerce, and, at page 596: "We are clearly of opinion that, in the exercise of its power to regulate immigration, and in the very act of exercising that power, it was competent for Congress to impose this contribution on the ship owner engaged in that business."

It has not, at this writing, been asserted that the creation of the general railroad contingent fund, for loans to carriers and for the acquisition of railroad equipment and facilities to be leased to carriers, could be deemed the real object of the provisions of paragraphs (5) and (6) of Section 15(a) and that the appropriation of the carrier's income could be sustained as a contribution levied to create that fund as a burden properly to be borne by the industry. But the point may be advanced as a possible phase of the argument under the theory of the taxing power. We believe that such a contention would be far-fetched and without merit.

The creation of the general railroad contingent fund—the name assigned in paragraph (6) to the fund resulting from the seizure of the alleged excess income—was not the *object* of the action of Congress, but merely the disposition or appropriation of the income seized, in other words, a by-product. We refer to the discussion and analysis under the preceding Point I of the real object of Congress, leading to the irresistible conclusion that the primary object was to regulate carrier incomes which Congress considered excessive. The recital in paragraph (5) states in unequivocal terms that the purpose is to take from carriers net railway operating income received by them “substantially and un-reasonable in excess of a fair return”. The Senate Committee report, quoted under Point I, explained that: “It is obvious”, that, in view of the supposed greater assurance of a fair return, “there should be a maximum beyond which an individual carrier shall not be permitted to retain for its own use all it may receive under a given body of rates”. The alleged excess income is declared by paragraph (5) to be held by the carrier “as trustee” for the United States, and by paragraph (6) the method of computing the alleged excess is defined and it is required to be paid to the Commission—all these provisions preceding any reference to the general railroad contingent fund or to the purposes to which the alleged excess to be collected from the carriers shall be devoted. The Court would not be justified in ignoring the facts, and reasoning upon the premises that the creation of a fund, for loaning to carriers and for acquiring

equipment and facilities to be leased to carriers, was the object of the enactment of these income provisions. To warrant such a premise, paragraph (5), which states the purpose and theory of these provisions, should have read to the effect that "Inasmuch as it is desirable and "in the public interest that carriers be aided in financing "expenditures for capital account and refunding maturing securities, and in acquiring railroad equipment "and facilities, and inasmuch as the creation of a fund "for these purposes is a burden which could be borne "by those carriers realizing from their railway operations a net income in excess of a fair return, it is "hereby declared", etc. The foregoing recital, appropriate to the theory now under discussion, is totally different from the form of recital which Congress actually employed as a statement and explanation of the theory of its action.

We call attention in this connection also, as in connection with the consideration of these provisions on the theory of a tax in the strict sense, to the utter inconsistency of the declaration in paragraph (5) that the alleged excess shall be held in trust for the United States. If this were a levy of a contribution to support an object constituting a proper burden of the industry, it would have been neither necessary nor appropriate to declare that the portion of the income exacted for such contribution never belonged to the carrier but was received by it in trust for the United States.

The purposes of the railroad contingent fund, as named in the statute, are undoubtedly purposes for which Congress may appropriate public money under its power to regulate interstate commerce. The designation of these purposes, however, has no more tendency to support the validity of the taking of carrier income than if it had been directed that the amounts collected from the carriers should be covered into the Federal Treasury and be subject to appropriation for all public purposes. If the limited purposes of the fund were controlling in determining the validity of the provisions for taking the income of the carriers, it would be necessary that the purposes, as originally prescribed, should stand intact forever, or at least that any amendments should leave them their character as objects within the commerce power. Of course, this result was never intended; it was designed that the fund collected from the carriers should be under the absolute disposition of Congress at all times.

But, it might be granted, for the purposes of the argument, that the creation of the fund for the purposes described in paragraph (10) was the *object* of the income-appropriation provisions of the statute instead of an incident or by-product of the legislation. These provisions could not be sustained, even on that assumption, for the following reasons:

The burdens in connection with any industry, which may be imposed upon the industry, as an incident of regulation, have a limit. Although that limit has not been defined by this Court and we have no de-

cision as a precedent for the present case, judged in its hypothetical aspect now under examination, even superficial consideration is convincing that the limit of permissible regulation would be exceeded in placing this burden on the industry. The financing of capital expenditures, the refunding of outstanding capital obligations and the acquisition of equipment and other railroad facilities are in their very nature not matters to be provided for through income. The most prosperous carriers could not meet their capital requirements from income, certainly not without depriving their stockholders of all dividends. These purposes call for new capital contributions, normally obtained through securing investors in additional issues of stock and bonds of the carriers. If Congress believes that the Government should assist in providing the new capital constantly required for the proper development of the railroad facilities of the country as a whole, it should do so by appropriations of public funds raised by general taxation. Such a course would make the general public contribute needed additional capital, for the benefit of the whole country, as taxpayers rather than as investors. To consider that these new capital requirements, or any part of them, are a proper burden to be borne by the industry as a whole, through contributions levied upon income or otherwise measured, would exceed any application of this principle of regulation which has ever been advanced.

Noble State Bank v. Haskell, 219 U. S. 104, may be invoked by the Government as a precedent. That

case involved the Oklahoma Bank Depositors Guaranty Fund (which has within recent history demonstrated its economic unsoundness), created by assessment upon all state banks of 1 per cent. (later increased to 5 per cent.) of average deposits, to be used to make good deficiencies due depositors of insolvent banks. This Court held that the State could prohibit the whole business of banking except upon such conditions as it might prescribe and that if the State legislature declared that free banking was a public danger and required this method of financial co-operation as a necessary safeguard, this Court could not interfere. This Court referred to that case in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 245, as involving "a special imposition in the nature of an occupation tax upon all banks existing under the laws of the State". We believe that the *Oklahoma* case does not illustrate the principle which we are now discussing, but that the imposition there involved could not have been sustained except in the case of a business conducted only by the sufferance of the State, and that the power of Congress to regulate interstate commerce is not comparable with the State's power over banking institutions chartered by it. There were decided at the same time with the *Oklahoma* case, and in the same way, *Shallenberger v. First State Bank*, 219 U. S. 114, and *Assaria State Bank v. Dolley*, 219 U. S. 121, involving similar bank guaranty acts of Nebraska and Kansas.

Mountain Timber Co. v. Washington, 243 U. S. 219, in which the Workmen's Compensation Act of the State

of Washington was sustained, is, we believe, the most extreme application of the theory of imposing upon the industry a burden connected with the industry or its regulation which has been adjudicated under any power of regulation not carrying the power of prohibition. This Act classified businesses according to the hazard of injury to employees, imposed upon each employer in those employments classed as hazardous a contribution measured by a percentage of his payroll, which varied from $1\frac{1}{2}$ to 10 per cent. according to the degree of hazard, and devoted the fund so produced to the payment of disability benefits to injured workmen or death benefits to their dependents. This system of compensation excluded private rights of action for injuries, etc. The rates of contribution were declared to be subject to adjustment in the future to carry out the intent that the fund should be merely self-supporting. The act went further than the compensation laws of other states in that it enforced the contributions from an employer, for the benefit of his group, whether or not injuries befell his own employees. This Court stated at page 237 the crucial question to be whether regarding that legislation as a mere exercise of the power of regulation or as a combination of regulation and taxation, it was "not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power". For some of the considerations in support of the validity of the law the Court referred to its opinion in *New York Central Railroad v. White*, 243 U. S. 188, concerning the New York Com-

pensation Act, and the opinions in the two cases must be read together. It was considered in the *New York* case, page 201, that the act resulted in a redistribution of the liability or burden resultant from industrial accidents, as it existed under the common law, both the employee and the employer being deprived of certain rights incident to the old system but on the other hand receiving certain advantages. The Court said, page 202, that it could not "ignore the question whether the "new arrangement is arbitrary and unreasonable, from "the standpoint of natural justice". But it considered that the situation dealt with was an employer and employee engaged by mutual consent in a common operation of advantage to both, with more or less probability that the employee would lose his life or suffer injury, with a loss of earning power representing the employee's capital in trade, that such a loss arising out of the business is an expense of the operation as directly as the cost of repairing broken machinery, that on grounds of natural justice it is not unreasonable for the State, while relieving the employer from the greater responsibility for damages under the common law measure, to require him to contribute according to a reasonable and definite scale by way of compensation for the loss of earning power incurred in the common enterprise, through injuries resulting from the employment in which the parties were engaged as co-adventurers. In the *Washington* case, at page 243, the Court said: "We are clearly "of the opinion that a State, in the exercise of its power "to pass such legislation as reasonably is deemed to be

"necessary to promote the health, safety and general
 "welfare of its people, may regulate the carrying on of
 "industrial occupations that frequently and inevitably
 "produce personal injuries and disability with conse-
 "quent loss of earning power among the men and
 "women employed, and, occasionally, loss of life of those
 "who have wives and children or other relations de-
 "pendent upon them for support, and may require that
 "these human losses shall be charged against the indus-
 "try, either directly, as is done in the case of the act
 "sustained in *New York Central R. R. Co. v. White*,
 "*supra*, or by publicly administering the compensation
 "and distributing the cost among the industries affected
 "by means of a reasonable system of occupation taxes."

The *Washington Workmen's Compensation Case*, although the law involved was so extreme as to be sustained by only a bare majority of the Court, falls far short of constituting a precedent for the assessment of the industry to create the general railroad contingent fund. There is not the slightest resemblance between workmen's compensation and the purposes of the general railroad contingent fund. In the compensation cases the industry is required to bear as a cost of operation a measure of the burden of personal injuries inevitably resulting from the conduct of the business. Like other operating costs the amount can be passed on to ultimate consumers. The burden is apportioned among the various enterprises constituting the industry in a proportion determined by the reason for the assessment. It was considered in the compensation

cases that the employer received some consideration for his contributions in the limitation of his common law liability, and also that the assurance of compensation for injuries would to some extent be reflected in wages. The contributions to the general railroad contingent fund, on the contrary, are not a readjustment of any previous liability, cannot be reflected in any degree by reductions of other liabilities or expenses, are assessed upon carriers selected according to their alleged excess net income, a method of selection bearing no relation to the purpose of the contingent fund, and cannot be passed on to the ultimate consumer. This inability to shift the burden is a most important consideration. It may with entire propriety be said that the "industry bears" the cost or the burden in cases where the amounts assessed for any purpose may be treated as operating costs and included in the cost of the product of the business. It is then the whole portion of the public which uses the product of that particular business that bears the cost or burden, as should properly be the case. But when the cost or burden is imposed on the owner of the business in such a manner that it cannot be passed on, it is not "the industry" which bears the cost or the burden, but the owner of the business in his capacity as an investor. The railway operating income appropriated by this law is taken from the stockholders and it continues permanently as their loss or burden.

The purposes of the general railroad contingent fund are not such that the fund can fairly and reasonably be required to be furnished by the carriers' stock-

holders. The purposes are solely capital purposes, namely, the acquisition of additional equipment and facilities or the refunding of old capital obligations. They are essentially different in principle from the making good (so far as money can) the personal injuries suffered by employees in the business, involved in the compensation cases, or the losses of depositors, involved in the bank deposit guaranty cases. The purposes are the physical enlargement or expansion of the various enterprises of the industry, so far as additional facilities and equipment are concerned, and the securing of new investors in such enterprises in place of old investors, so far as refunding is concerned. It may be argued that the stockholders of a public utility undertake to enlarge and add to their facilities as necessary to meet the growing needs of the public. If this be admitted, the obligation is no more than an undertaking to effect the additions to property through new capital supplied by new investors. And, to a great extent, the enlargement of the railroad facilities required to meet the needs of the public involves the building of new lines, an extension of the original undertaking of the stockholders which even the argument of implied obligation cannot be stretched to cover. These capital purposes all call for additional partners or investors in the enterprise. The obligations of the stockholders as to enlargements and additions are, in any event, confined to their own enterprise. To require that the stockholders, through enforced contributions from their income, should provide this new capital for other enterprises

in the industry, would not be consistent with "natural justice", with which this Court in *New York Central Railroad Co. v. White*, *supra*, considered legislation enacted under the theory of burdens of the industry should square.

In this connection and in conclusion, it may be appropriate to correct any assumption that the general railroad contingent fund was a measure of relief particularly designed for the benefit of the "weak roads". Had this been the design of the fund the following language of this Court in *Adkins v. Children's Hospital*, 261 U. S. 525, 557, would be appropriate: "To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole." The "weak roads" constituted an important phase of the problem confronting Congress in the enactment of the Transportation Act. But the relief, if any, afforded them by the provisions enacted was in the increased revenue which it was hoped the new rule of rate-making would produce. The general railroad contingent fund will aid the "weak roads" less than it will aid the average or the strong roads.

The problem of the "weak roads" was not solved by this enactment. The rule of rate-making on the group basis may be calculated to effect some improvement in the earnings of the weak roads, but it is inherent in this rule that the weak roads will earn less than the average roads of the group and, therefore, will realize less than a "fair return". The general railroad contingent fund established through the appropriations of income made from the stronger roads is to be used either by making loans to carriers to meet expenditures for capital account or to refund maturing securities or for acquiring transportation equipment and facilities to be leased to carriers. Such loans are required to be made at 6 per cent, and are restricted to cases in which the prospective earning power of the carrier and the security offered by it furnish reasonable assurance of its ability to repay the loan. Leases of equipment and facilities acquired with this fund may be made only when the Commission finds that the prospective earning power of the carrier furnishes reasonable assurance of its ability to pay the rental and meet its other obligations under the lease, and the rental charges must be such as to pay a return of 6 per cent. and an allowance for depreciation upon the valuation of the equipment or facilities so leased. [Paragraphs (10) to (14) of Section 15a.] It would appear doubtful whether, under these restrictions, the general railroad contingent fund will be at all available to the weak roads for aid in new financing or refunding of old obligations or in acquiring equipment and additional facilities,—certainly the fund is not designed for their special and particular benefit.

From a consideration of the committee reports and an analysis of the pertinent provisions of the law as enacted, the conclusion is irresistible that the income appropriation provisions have little, if any, relation to the problem of the weak roads, but are designed simply to prevent the realization by the stronger roads of a net railway operating income in excess of an amount which Congress was willing they should retain.

October, 1923.

Respectfully submitted,

JOSEPH PAXTON BLAIR
 EDGAR H. BOLES
 JOHN F. BOWIE
 ROBERT J. CARY
 HENRY W. CLARK
 HERBERT FITZPATRICK
 LAWRENCE GREER
 W. S. HORTON
 WILLIAM S. JENNEY
 E. W. KNIGHT
 RICHARD V. LINDABURY
 WILL H. LYFORD
 SAMUEL W. MOORE
 WILLIAM CHURCH OSBORN
 WINSLOW S. PIERCE
 HENRY V. POOR
 JOHN H. AGATE
 CARL A. DE GERSDORFF

As Amici Curiae.



APPENDIX.

Text of Section 15a of the Interstate Commerce Act, as added by Section 422 of the Transportation Act, 1920.

41 Statutes-at-Large 488.

“(1) When used in this section the term “rates” means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term “carrier” means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term “net railway operating income” means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

“(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way,

structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

“(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to $5\frac{1}{2}$ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

“(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as

often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

"5. Inasmuch as it impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

"(6) If, under the provisions of this section, any carrier receives for any year a net railway operating

income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

“(7) For the purpose of paying dividends or interest on its stocks, bonds, or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

"(8) Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose.

"(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

"(10) The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositories of the United States subject to the rules promulgated from

time to time by the Secretary of the Treasury relating to Government deposits.

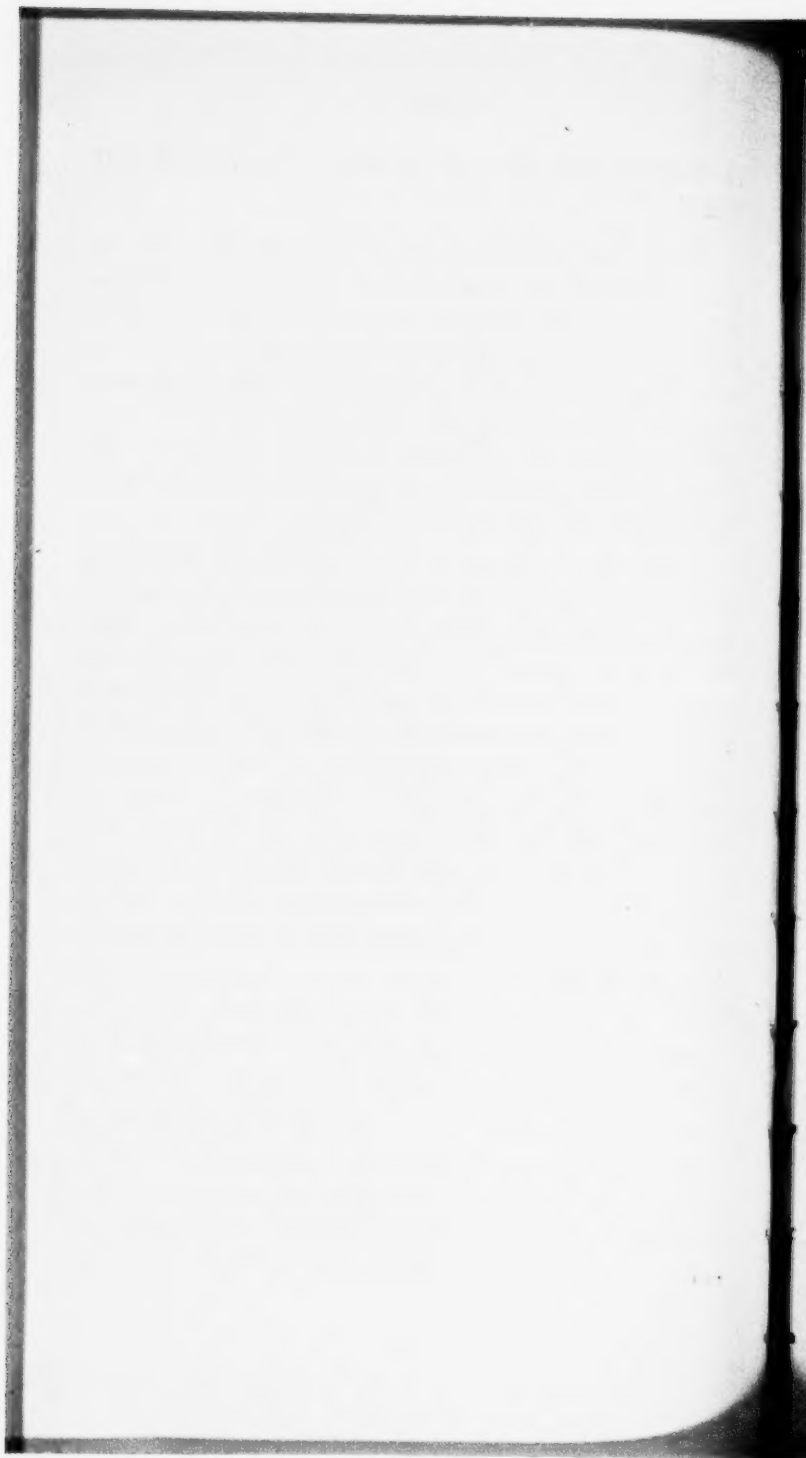
“(11) A carrier may at any time make application to the Commission for a loan from the general railroad contingent fund, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operations, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry.

“(12) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan from the general railroad contingent fund is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the Commission may make a loan to the applicant from

such railroad contingent fund, in such amount, for such length of time, and under such terms and conditions as it may deem proper. The Commission shall also prescribe the security to be furnished, which shall be adequate to secure the loan. All such loans shall bear interest at the rate of 6 per centum per annum, payable semiannually to the Commission. Such loans when repaid, and all interest paid thereon, shall be placed in the general railroad contingent fund.

“(13) A carrier may at any time make application to the Commission for the lease to it of transportation equipment or facilities, purchased from the general railroad contingent fund, setting forth the kind and amount of such equipment or facilities and the term for which it is desired to be leased, the uses to which it is proposed to put such equipment or facilities, the present and prospective ability of the applicant to pay the rental charges thereon and to meet the requirements of its obligations under the lease, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of leasing such equipment or facilities to the applicant as the Commission may deem pertinent to the inquiry.

“(14) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the leasing to the applicant of such equipment or facilities, in whole or in part, is necessary to enable the applicant properly to meet the transporta-



OCT 22 1923

WM. R. STANSBURY

CLERK

Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 330.

DAYTON-GOOSE CREEK RAILWAY COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA, THE INTER-
STATE COMMERCE COMMISSION, AND RAN-
DOLPH BRYANT, UNITED STATES DISTRICT
ATTORNEY FOR THE EASTERN DISTRICT OF
TEXAS.

Appeal from the District Court of the United States for the
Eastern District of Texas.

BRIEF

Asserting that it is the true economic value of railroad property, determined as in
a condemnation case, to which the recapture provisions of Paragraph (6) of
Section 15a, Interstate Commerce Act, are applicable.

SAMUEL W. MOORE,

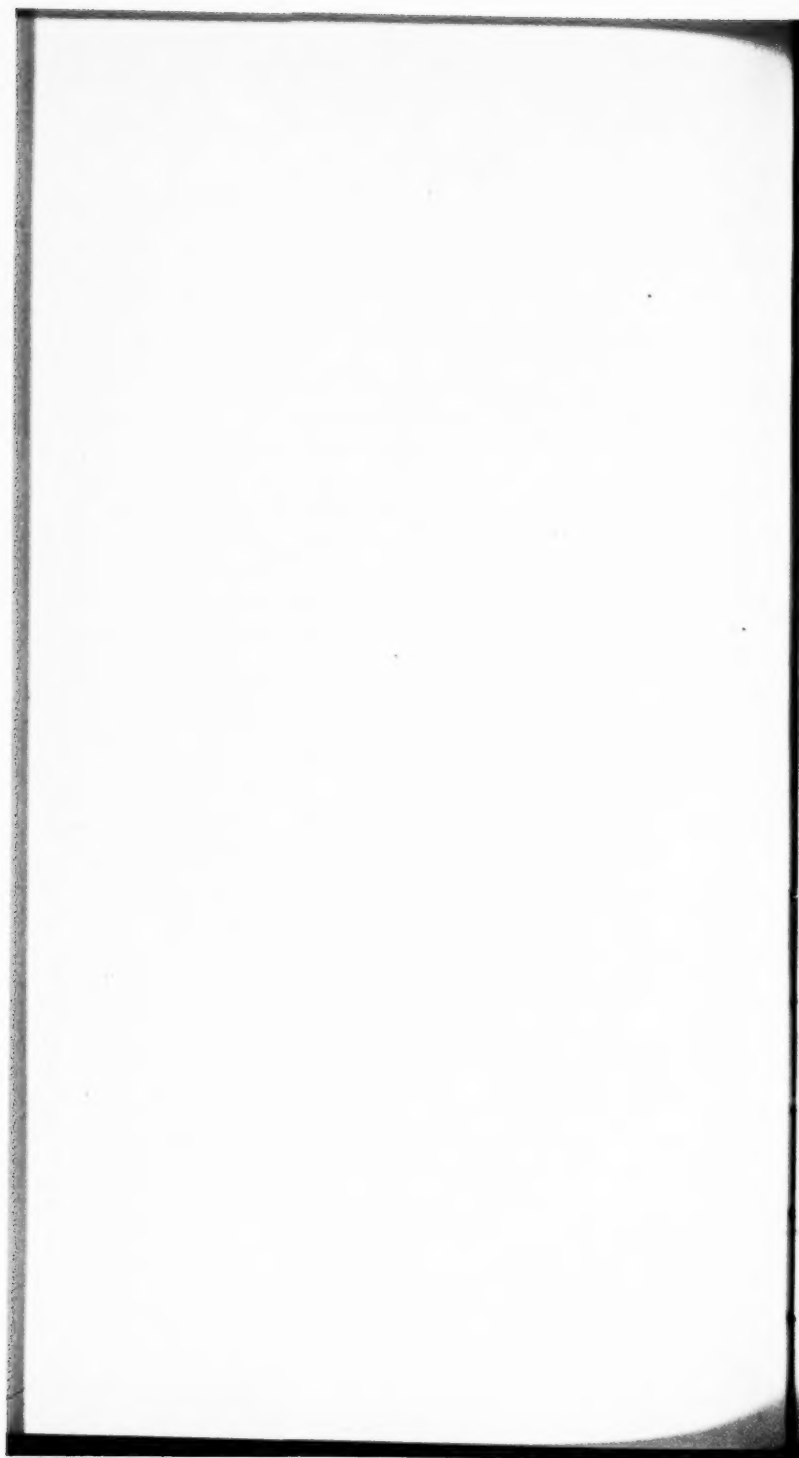
as Amicus Curiae.

October 20, 1923.



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Supreme Court of the United States,

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No. 330.

DAYTON-GOOSE CREEK RAILWAY
COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, THE
INTERSTATE COMMERCE COMMISSION,
and RANDOLPH BRYANT, UNITED
STATES DISTRICT ATTORNEY FOR THE
EASTERN DISTRICT OF TEXAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS.

Statement.

By leave of Court, the undersigned submits this brief as *amicus curiae* in the interest and behalf of The Kansas City Southern Railway Company upon the question of "the value of railroad property" which is to be taken

as a basis or starting point in the computation of excess earnings under Section 15a of the Interstate Commerce Act.

The Interstate Commerce Commission, which is charged with the enforcement of the recapture provisions of the Act, has apparently decided that the value of railroad property is not an economic, but an equitable concept; that the value upon which the exempt six per cent. is to be computed is a "sum" determined largely upon original cost, or cost of reproduction less depreciation, and called "a value for rate-making purposes", but bearing no relation to the exchange value or economic value of the property. Apparently, this so-called "value for rate-making purposes" is to be used by the Commission in the computation of the earnings of all railway companies or systems which have net railway operating income in any year in excess of six per cent. on such value.

It is believed that the so-called "value for rate-making purposes" is not *value* in any true sense, and that it is not *the value* required by the Valuation Act. It is asserted, on the contrary, that the value of railroad property on which the exempt six per cent. is to be computed is its true or economic value, as such value would be determined in a condemnation proceeding.

Inasmuch as one of the questions raised in this case is the "kind" of value of railroad property to which the recapture provisions are to be applied, it has been thought proper to file this brief in the hope that it may be helpful to the court in its consideration of this ques-

tion. It is intended hereby to supplement the arguments contained in other briefs asserting the unconstitutionality of the recapture provisions.

POINT I.

It is contended that the Valuation Act, for the purpose of the recapture clause, requires the ascertainment of economic value, and that the economic value of railroad property bears a relation to the income which it affords. If this be true, it can not be said, in advance of the ascertainment of such economic value, that the Dayton-Goose Creek Railway Company has any excess earnings subject to recapture.

On March 1, 1913, the Valuation Act, now Section 19a of the Interstate Commerce Act, was approved, requiring the Interstate Commerce Commission to investigate, ascertain and report "the value" of all the property owned or used by every common carrier subject to the provisions of the Act. By the Transportation Act, 1920, the values so fixed by the Commission are required to be used for the recapture of excess earnings, for the purpose of consolidation, for the issuance of securities, and other governmental purposes.

Nearly, if not quite ten years ago contentions began before the Commission over the "kind" of value it was required to ascertain under the act, that is, whether it should be economic value, or something different, and

these contentions are still going on. So far, the Commission, in two final value cases—San Pedro, Los Angeles & Salt Lake Railroad Company and Atlanta, Birmingham & Atlantic Railroad Company—handed down September 11, 1923, has found what it denominates “a value for rate-making purposes” which does not purport to be true or economic value. Thus, it has found a value of \$23,245,257 for the Atlanta, Birmingham & Atlantic Railroad—a road which, up to valuation date, had not earned its operating expenses, and of which the Commission said (75 I. C. C. 668):

It does not now appear what changes, if any, the future will bring, but measured by all standards the expenditure of money on the road as of date of valuation were not justified by the service then rendered or the prospects of service within a reasonable period of time.

Mr. Commissioner Potter, in a dissenting opinion, described the hopelessness of this enterprise in even more forceful language, saying (p. 672):

Probably no one would assert that the property of the A., B. & A. is worth anything like \$10,000,000. Certainly no sane person would pay that amount for it. All of its securities could be bought for a smaller sum. It never has been and never can be worth that much. Neither past, present, nor prospective earnings indicate the possibility of any such value. It can not succeed as a legitimate business enterprise. It is not needed. It ought never to have been built, and, considered as a separate line, at least, it should be abandoned. Its assured and deserved destiny is to be scrapped,

unless it is absorbed in consolidation. In view of these facts, which I think we all know, I see no justification for according to this property a value of nearly \$24,000,000.

If this so-called value of "nearly \$24,000,000" stands, it must be added to the group value, and rates must be made which will yield $5\frac{3}{4}$ per cent thereon. Thus shippers will be required to pay a return on a value which Mr. Commissioner Potter regards as largely fictitious.

In the *San Pedro, Los Angeles & Salt Lake R. R.* case, apparently the same methods of valuation were applied, resulting in a so-called "value for rate-making purposes" in the sum of \$45,000,000. The evidence adduced in the case, indicating a valuation of approximately \$75,000,000 on the basis of earning power, was not accepted by the Commission.

The Commission evidently has made no effort thus far to ascertain economic value, but has contented itself with the determination of "a value for rate-making purposes." This it ascertains by the use of what amounts to a formula applied to cost figures, with the addition of land values determined by the average value of adjoining non-carrier lands. No actual consideration, and certainly no weight, has been given to the respective earning capacities of these two properties. There is no pretense that the Commission's figures represent, or were intended to represent, pecuniary or economic value.

It appears from an address by Mr. Leslie Craven at the annual meeting of the American Bar Association, August 28, 1923, entitled "Railroad Valuation: A State-

ment of the Problem," that at that time the Commission had issued 329 tentative valuations, the aggregate value found for the properties reported on being \$2,898,000,000. He says, in explanation of the methods employed:

An analysis of the figures shows that a cost formula has been generally employed although the same formula has not been applied in every case. In a very large number of cases, and in so great a number that obviously it is not by mere coincidence, it occurs that the addition of the cost of reproduction less depreciation, and the acreage value for non-railway purposes of the land, together with a sum which is 5% of the preceding two amounts, will produce a figure, to which the "final value" (reported in *round* figures) is very close. Taking the 329 tentative valuations as a whole, the final value found is 5.6% in excess of the aggregate cost of reproduction less depreciation and land value figures. Speaking generally, a cost method has been used for all railroads with no regard for their relative productivity, or the existence or non-existence of the qualities which determine value in any true sense.

The foregoing is referred to merely for the purpose of illustrating one concept of value, which we insist is not value at all, but which the Commission apparently has accepted, and which it calls "value for rate-making purposes." This school of thought treats value, not as an economic thing, but as an equitable concept, variously expressed by "what is fair" or "what is just and reasonable" or "what is right."

Judge Prouty, as Director of Valuation, in his memorandum in the Texas Midland case, pages 2 and 3, described his conception of value for rate-making purposes as that "sum, upon which, under all the circumstances and upon a fair consideration of all the facts and elements to be taken into account, a fair return should be permitted." This is evidently the conception of value adopted by the Commission.

We contend that such value, when used as the basis of an action for the recapture of excess earnings, is unreal and fantastic, and not the value protected by the Fifth Amendment; and this contention will be considered later.

The other concept of value, which we believe to be the true one and which has been urged upon the Commission in the course of its proceedings under the Valuation Act, is economic value, exchange value or pecuniary value, all of which mean one and the same thing. This school of thought treats value as "power in exchange," as the market value, as the amount which a willing purchaser but not compelled to purchase, would be willing to pay, and a willing seller but not compelled to sell, would be willing to accept. It is the value which would measure "just compensation" in a condemnation suit.

It is true that while the securities of a railroad company may have a market value, yet railroad properties themselves are not customarily bought and sold in the market so as to establish a market value. But the Valuation Act obviously intended that the Commission should ascertain the true economic or exchange value of railroad

properties, as an equivalent or substitute for their market value.

Value is thus defined by this court in *International Harvester Co. v. Kentucky*, 234 U. S. 216, 222:

Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator.

This is a definition of exchange value. It is the value which would be awarded the owner of railroad property if it were taken by the Government in the exercise of its power of eminent domain. It is the value on which a railway company is constitutionally entitled to earn a fair return. It is the value on which properties are consolidated, on which securities are issued, and taxes paid. It is very far removed from an arbitrary "sum"—determined without any standard, and without chart, compass or guide—upon which "a fair return should be permitted." The Fifth Amendment protects private property to its full value; if it merely protected an arbitrary "sum," it would be so vague and indefinite as to be unenforceable.

The Valuation Act was passed after value had been defined by this court as above quoted, and Congress is presumed to have known of this judicial definition and to have used the word in its economic sense (*Thorn v. Browne*, 257 Federal 523). Certainly, Congress had in mind the Fifth Amendment, for it was careful to preserve to each carrier six per cent. upon the value of its railroad property. It is clear that if Congress had defined excess income as net railway operating revenue over

and above six per cent. upon an arbitrary "sum" bearing no relation to economic value, determined by no rules or standard, but resting in the inner consciousness of the individual who fixed it, such six per cent., so computed, could not for a moment be regarded as a compliance with the amendment. Undoubtedly, Congress intended that the six per cent. should be applied to the true or economic value of railroad property, determined in accordance with established principles. Otherwise the six per cent. provision would be meaningless. It is not conceivable that there can be different values for different purposes, any more than that there can be different units of weight and measure for different purposes. When "the value" required to be ascertained by the statute has been found, it is the value for all purposes (*Havre de Grace Bridge Co. v. Towers*, 132 Md. 16, 103 Atl. 319; *State ex rel. Oregon R. & Nav. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7; *State ex rel. Bee Bldg. Co. v. Savage*, 65 Neb. 714, 91 N. W. 716; *Re Raritan River Co.*, P. U. R. 1915-E, 72).

If railroad property is taken in the exercise of the power of eminent domain, the compensation to which the owner is entitled is "the full and perfect equivalent of the property taken," and this includes interest on its value until the compensation is paid (*Seaboard Air Line* case, decided March 3, 1923). The taking of the title to private property for public use, and the taking of the use of private property in the public interest, are one and the same thing in principle, and both are equally protected by the limitations of the Fifth Amendment. This is the holding of the *Reagan* case (154 U. S. 362, 410), where,

in an action to enjoin a schedule of rates alleged to be confiscatory, the court said:

If the state were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood *in the markets of the world*, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its *market value*?

It is to be noted that the use of railroad property for the public benefit may not be taken at less than its "market value," and that the value of the property "as it stood in the markets of the world" is the value protected by the constitutional provision. There is no intimation that some arbitrary "sum" deemed fair and just shall be the criterion.

The constitutional guaranty extends to the use of property as well as to the property itself (*Buchanan v. Warley*, 245 U. S. 60; *Brooks-Scanlon Co. v. R. R. Comm.*, 251 U. S. 396; *Northern Pacific R. Co. v. North Dakota*, 236 U. S. 585; *Norfolk & Western R. Co. v. Conley*, 236 U. S. 605).

1. *The economic value of railroad property bears a relation to the income which it affords.* It is entirely plain, we respectfully submit, that it is the true or economic value of railroad property to which the provisions of the recapture clause must be applied. How is that

value to be ascertained and determined? It appears to be fairly well settled that the economic value of property bears a relation to the income which it affords; that value results from the use to which the property is put, and varies with the profitableness of that use, present and prospective, actual and anticipated, and that the amount and profitable character of such use determines the value. A brief reference will now be made to some of the cases in this court where this rule has received approval.

This court in *South Utah Mines & Smelters v. Beaver County*, a tax case decided May 21, 1923, held that the value of property does bear a relation to its income, saying:

The value of property bears a relation to the income which it affords. If it be property whose production is uniform and of indefinite duration the capitalization of the net income derived from it at the going rate of interest, in the absence of a more certain method, will furnish a reasonable measure of the value.

In *Branson v. Bush*, 251 U. S. 182, 187, the same principle is stated, where the value of railroad property was under consideration, the court saying, quoting from *R. R. Co. v. Backus*, 154 U. S. 439:

But the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value.

In *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, a lock and dam in the Monongahela River were condemned by the Government, and the question arose as to the compensation to which the owner was entitled. It was held that the owner was entitled to "the full equivalent therefor", and this was measured by the value of the property, and this value was determined, not by the mere cost of construction, but by the earnings of the property, which largely determine its value. The court said (p. 328):

How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner. Various elements enter into this matter of value. Among them we may notice these: Natural richness of the soil as between two neighboring tracts—one may be fertile, the other barren; the one so situated as to be susceptible of easy use, the other requiring much labor and large expense to make its fertility available. Neighborhood to the centers of business and population largely affect values. For that property which is near the center of a large city may command high rent, while property of the same character, remote therefrom, is wanted by but few and commands but a small rental. Demand for the use is another factor. The commerce on the Monongahela river, as appears from the testimony offered, is great; the demand for the use of this lock and dam constant. A precisely similar property, in a stream where commerce is light, would naturally

be of less value, for the demand for the use would be less. The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. For each separate use of one's property by others, the owner is entitled to a reasonable compensation, and the number and amount of such uses determines the productiveness and the earnings of the property, and, therefore, largely its value.

So, in valuing railroad property, various elements enter into the matter of value; the efficiency of the transportation plant, its capacity to handle an increased volume of traffic without additional capital expenditures, its strategic position, its terminals, its nearness to large centers of population and to centers of industry and commerce, the location and character of its competing lines, the volume of traffic naturally tributary to its rails, the permanency of such traffic and its possible further development and increase, its gradients, curvature, costs of operation, and many other circumstances, all of which contribute, in a greater or lesser degree, in determining its earning power. For each separate use of his property, the owner is entitled to a reasonable compensation, and the number and amount of such uses determines the productiveness and the earnings of the property, and therefore largely its value. In other words, the value of railroad property bears a relation to the income which it affords.

In *Omnia Commercial Co. v. U. S.*, decided by this court on April 9, 1923, reference is made to the *Mononga-*

hela case, supra, and after quoting therefrom, the court said:

The lock and dam constituted, in effect, a going concern, whose value was of course affected by what it would produce.

In *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, the property of an express company, both intangible as well as tangible, had been assessed at \$4,189,818. The value of its tangible property was \$1,159,491. The company insisted that it should be assessed only at the lower figure; but this contention was denied by the court, saying:

It is worth \$4,189,818 for the purpose of income to the holders of the stock and for the purposes of sale in the markets of the land. * * * The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for the purpose of sale.

In *St. Louis & East St. Louis Electric R. Co. v. Missouri*, decided May 2, 1921, the question was the value of .346 of a mile of track in the State of Missouri, assessed at \$186,019, of which \$13,019 represented tangible, and the remainder intangible property. It was objected that the assessment should be limited to the value of the tangible property, but it was held that the company possessed certain valuable contracts which gave to its property the higher value, the court saying:

It was these contracts which gave the company's small extent of physical property *an earning capacity, and therefore a value.*

In *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, it appeared that a gross revenue tax of the State of Minnesota was imposed upon the car line of the Packing Company. It was contended that the tax should be limited to the cash value of the cars, taken separately, but this court held that the State might tax the property "at its real value as a part of a going concern", saying:

The record makes it reasonably certain that the property, *valued with reference to its use and what it earns*, is worth considerably more than the cash value of the cars taken separately.

A similar question was decided in *Union Tank Line v. Wright*, 249 U. S. 275, where the court said:

While the valuation must be just, it need not be limited to the mere worth of the articles considered separately, but may include as well "the intangible value due to what we have called the organic relation of the property in the state to the whole system."

¹ In *Louisville & Nashville R. Co. v. Greene*, 244 U. S. 522, the court said, in speaking of the methods of determining the value of railroad property for taxation:

In such cases there are (at least) two recognized methods, known as the stock-and-bond plan and the capitalization of income plan. In the present case the latter was followed.

2. *The valuation of competing railroads can not be controlled by the principles applicable to the valuation of monopolistic utilities.* It will tend to clearness of thought if we bear in mind the essential distinction between the valuation of public utilities, such as a water company or a gas company, located in a single municipality, and the valuation of competing railroads, operated under the same rates but with different costs of operation and different volumes of traffic. A water company, for example, operates in a single municipality and without competition. Rates or charges are established for it by public authority, and for it alone. If its net revenue is deemed too great by those who make the rates, the rates, and therefore the revenue, may be reduced, in the absence of a binding contract to the contrary. If the net revenue is deemed too small, the rates, and therefore the net revenue, may be increased. The rate-making body deals directly with this one utility and is in a position at all times to control its revenues. In these circumstances, the law has laid down a rule for the ascertainment of the value of the utility, or rather its rate base, on which it is entitled, in any event, to earn its constitutional return, and as much more as the rate-making authority may permit. This rule is to take cost of reproduction new, computed at current prices, deduct depreciation, add the value of land and a more or less arbitrary sum for going concern, and the result is called value, or, more properly, a rate base.

Competing railroads occupy an essentially different position. Published rates, applicable to the service of

transportation which they perform, must of necessity be the same between competing points, as well as upon competing commodities. If this were not so, traffic, which like water seeks the lowest level, would flow over the road with the lowest rates to the exclusion of its competitors and to the confusion and disorganization of railroad operation. The operating cost on each road will be different, due to density of traffic, gradients, and many other causes. The volume of traffic will likewise vary on each road. It is axiomatic that competing carriers under the same rates, with varying costs of operation and varying volumes of traffic, will have widely varying profits, and these profits will bear no direct relation to original cost, or cost of reproduction, or cost of reproduction less depreciation, or other physical circumstances or characteristics. The outstanding feature is that while rates and charges of a public utility are fixed for it alone, and the rate-making power is thus enabled to control its revenue, in the case of railroad companies the rate-making power can not deal directly with each individual carrier and fix rates and charges for it alone, and thus control its revenue; but, on the contrary, the rates and charges of competing railroads are not based upon the value of any individual road, but upon the aggregate value of railway property in each competing group, with the result that the net income of the individual members of a competing group will depend upon what they can earn under rates which are the same for all. It is thus that the "strong" roads with a good earning power, and "weak" roads with a lower earning

power, are developed. It is not practicable for the rate-making authorities to establish still lower rates (even if the law permitted them to do so) for the purpose of reducing the net earnings of the strong lines, for the result of such an effort would be to still further impoverish the weak lines, with resulting bankruptcy and inability to render the service which the public demands. So long as this condition exists, the so-called strong lines will enjoy larger net revenues and possess a correspondingly greater value than the so-called weak lines. That different carriers have different earning power is recognized in paragraph (5) of Section 15a of the Interstate Commerce Act, where it is said:

Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic, etc.

The essential difference between monopolistic public utilities, operating in a single city, whose income can be increased or decreased at the will of the appropriate rate-making power, and competing railroads operating under uniform rates, but with different operating costs and volumes of traffic, and with widely different earning power, should, we respectfully submit, be constantly borne in mind.

3. *There is no "vicious circle" involved in giving weight to earning power in the determination of the eco-*

nomic value of railroad property. Many arguments have been levelled against the use of earning capacity under reasonable rates in the determination of value. It is urged that under this theory, value is made to depend upon rates, and rates in turn are determined by the value thus fixed, and so, it is said, we go around in a circle. Judge Prouty, in his Memorandum upon Final Value, page 7, has stated the argument as follows:

A rate-making value is to be stated for the purpose of determining a fair rate. Commercial value is determined by the rates actually in effect. If, therefore, commercial value is to determine the rate, then the present rates must be right.

Judge Prouty's criticism might be justified in the case of a water works operating in a single municipality, without competition. If its earning capacity under existing rates indicates a net revenue of, say, \$6,000,000 per year, year after year, as far as the future can reasonably be predicted, this would be six per cent. annually upon \$100,000,000, and the latter sum would fairly represent its value on a six per cent. basis. By taking this value as a starting point to determine what rates should be charged, and assuming that the plant is entitled to six per cent., or \$6,000,000 per year, it will, of course, be found that the rates necessary to yield that return are the rates in effect at the time under consideration. The same might be true in the valuation of railway property if there were but one railroad in the country, so that the rate-making power would be enabled to deal with it directly.

But Judge Prouty's criticism fails entirely when applied to existing conditions, where we have a large number of carriers operating in competition with each other. As before stated, the railways of the country operate in competing groups, with the same rates between competitive points but with different operating costs and with different volumes of traffic, and, therefore, widely different earning capacities. It is impossible for the rate-making authority to deal with each carrier individually. If the Commission could do that which is impossible—that is, make separate rates for each carrier between competitive points, and make these rates dependent upon the value of each carrier's property—then Judge Prouty's criticism might be a just one, since, in that case, as in the case of the water works, value would depend upon the rate, and, in turn, the rate could be made to depend upon value.

But rates applying to competing carriers can not be made separately upon the value of each individual line. Prior to the Transportation Act, they were made by the Commission by a consideration of all the lines in a competing group—the strongest as well as the weakest—the aim being to make the rate for the group fit the average condition. After the passage of that Act a rate base was created, consisting of the aggregate value of the railroad properties in each group. The rates must be so constructed as to yield a given percentage on the aggregate value in each group. The group value, therefore, and not the value of the individual road, is the unit that must be dealt with in the making of rates.

The rate base for the Western Group is \$8,100,000,000. Rate schedules which are calculated to yield six per cent. on this sum are conclusively presumed to be reasonable. They are made so by the Transportation Act. The net earnings of individual carriers in the group, under the rates so made, will, of course, differ widely. The earning capacity of each carrier will largely determine its commercial value. But this commercial value of each individual carrier (\$653,033, the Commission's value in the case of the Dayton-Goose Creek) does not determine what the rates shall be. That depends upon the \$8,100,000,000 rate base. If the value of the Dayton-Goose Creek, or of any other individual line, were doubled or trebled, or wiped out altogether, the effect on the rate level in the group would be negligible. There is, therefore, no "circle" involved in taking the aggregate value in the group as a rate base, and basing rates thereon, and using the net earnings of each individual line, under such rates, as a factor in its commercial value.

Again, the courts are unanimous in holding that where a schedule of reasonable rates has been lawfully determined by the legislative authority, the earning power of a given carrier is a proper and important matter for consideration in the determination of its value. The plain reason is that, as in ordinary commercial and industrial enterprises (not subject to public regulation), earning capacity under prices and charges fixed in the open market determines the value, so in the case of enterprises subject to public regulation, the prices and charges fixed by public authority are in lieu of and in substitu-

tion for those which otherwise would be fixed in the public market. If earnings under competition-made prices are an important factor in fixing value, so must be earnings under commission-made prices, since the commission fixes prices which would be fixed by free competition if it existed. This thought is well expressed in *Utilities Commission v. Springfield Gas Co.*, 291 Ill. 209, 219, where it is said:

Fixing rates by public authority may secure to each individual the advantage of collective bargaining by all in behalf of the whole body of consumers and result in such a rate as might properly be supposed to result from free competition, if free competition were possible.

In this connection, it should be borne in mind that the Commission itself, in its thirtieth annual report, dated December 1, 1916, declared, in substance, that all rates then in effect were reasonable and asked Congress to so declare by statutory enactment. It said (p. 78):

All rates, fares and charges have been open to complaint for a period of more than ten years, within which the Commission had power to fix the future maximum rates. For a period of more than six years all proposed increased rates have been subject to protest and suspension before becoming effective. Obviously, there should come a time when as to the past the general level of the rates and the relationship of rates should be fixed as reasonable. We are convinced that the best interests of the entire public, of the system of governmental regulation of rates, and of railroads,

will be served by the enactment of a statute which, as of a specified date, fixed the existing interstate rates, fares, classifications, rules, regulations and charges as just and reasonable for the past, and which provides that after that date no change therein may be made except upon order of the Commission. Of course, causes pending at the time of the enactment of such a statute should be preserved. The time as of which the existing rates, fares, charges, classifications, rules and regulations are declared to be reasonable for the past should antedate somewhat the date of the enactment, in order to prevent the filing of numberless complaints and new rate schedules in anticipation of a date fixed at some time in the future.

Not only does the Commission itself say, in substance, that its rates then in effect were reasonable, but there is a "strong presumption" in favor of the reasonableness of rates made by an experienced administrative body after full hearing (*Darnell v. Edwards*, 244 U. S. 564). The Commission having the power to fix future maximum rates and to suspend all proposed rates before becoming effective, the strongest presumption exists that all uncontroverted rates are at all times reasonable. Furthermore, while a schedule of rates is in force, the legal effect is precisely the same as if an act of Congress had been passed specifically prescribing each individual rate contained in the many schedules (230 U. S. 197; 271 Fed. 449). Surely, no one would seriously question that earnings under rates so established would be competent evidence of economic value.

It is always to be borne in mind that the reasonableness of rates is not to be tested by the amount of revenue which a railway company may receive from its entire rate schedules, nor is it to be tested by the mere value of the property employed in the service of transportation. The reasonableness of the charge for each service which a carrier may perform is the unit to be taken and considered as a separate and distinct problem. If the particular charge for that specific service is reasonable from the standpoint of the shipper as well as from the standpoint of the carrier, the rate is reasonable; otherwise not. For each particular service performed by the carrier it is entitled to a reasonable charge. The number and profitable character of such charges, present and prospective, will determine its earning capacity, and will afford the best measure of its value. In the *Monongahela* case, *supra*, where the charges were subject to public regulation, the rule is stated as follows:

For each separate use of one's property by others, the owner is entitled to a reasonable compensation, and the number and amount of such uses determine the productiveness and earnings of the property, and, therefore, largely, its value.

To the same effect are *Cotting v. Godard*, 183 U. S. 79; *Canada Southern R. Co. v. International Bridge Co.*, L. R., 8 App. Cas. 723, 731; *R. R. Comm'rs v. Illinois Central*, 20 I. C. C. 181.

There is still another reason why earning capacity may legitimately be given consideration. As before

stated, the railroads composing a competing group or competing groups will have varying earning powers. Some may be strong roads, and others weak roads. The strong roads will have a differential in earning power over the weaker lines, and this differential will continue to exist as rates and revenues increase or decrease. While it is true that the Government possesses the power to reduce rates, and so to reduce earnings; and while it is not probable that the Government would ever exercise such a power oppressively or unjustly, yet there is a practical limit to the exercise of the power. The railroads are the arteries of commerce, and must be maintained in as high a state of efficiency as the transportation service which they afford, respectively, requires or demands. It is not conceivable that a policy destructive of existing railroads would be pursued by the Government; on the contrary, the demand of the people that existing systems of transportation be preserved and improved, can not be ignored; and any administration that persisted in thinking otherwise would be short-lived.

4. *Assuming that the Act requires the ascertainment of economic value, how is it to be determined?* If it be true, as appears to be abundantly established by authority, that the value of property does in fact bear a relation to the income which it affords; that such value is increased as the company becomes prosperous and its net railway operating income becomes greater; and that such value is lessened when such income decreases, these principles should be applied to ascertain the true value of

the Dayton-Goose Creek property, and, when such value is ascertained, to apply to it the recapture provision.

Property is valuable in the judgment of mankind for what it will produce; its productivity or earning capacity, past, present and future, is the chief factor from which the judgment of value is derived. But before earning capacity can be determined, the physical property, in all its parts and in all its relations, must be considered and examined with the greatest care; and when earning capacity has once been determined, it is the ultimate factor of greatest importance, for it has merged or swallowed up a consideration of every element of the property, whether tangible or intangible, that tends, directly or remotely, presently or in the future, toward the production of income or the incurring of expense. An intelligent survey of the future prospects of a property is a most important factor, since value is a judgment largely resting upon prophecies of the future, based upon known conditions of the past and present. It is the uncertainties of the prophecies of future operation and future returns that make value so much a matter of varying judgment among men who have equal knowledge or equal opportunities for knowledge. If we could look into the future and see events as they would later transpire; if, for illustration, we could look into the future sufficiently to ascertain and determine with accuracy the net railway operating income of the Dayton-Goose Creek Railway, or of any other carrier, from year to year indefinitely in the future, business men would take these figures, apply the discounts, and

reach a judgment of value, on which they would be willing to buy or sell, with astonishing unanimity. The same would be true of any other industrial or commercial enterprise in the country.

There is a general consensus of opinion that property is worth an amount on which it will produce an assured income at the going rate of interest. This rule does not apply to speculative property, where the risk is considerable and the rate of return is not reasonably steady and assured. When we think of the value of bonds, stocks and farm lands, we think of the amount on which the investment will pay the going rate of interest.

It is the same with railroad property—it has no pecuniary value outside of its ability to produce income. The value of such property is ordinarily thought of in terms of income, and as the amount of money upon which the income will provide the going rate of interest. It was doubtless in recognition of this rational and almost universal conception of value that this court said, in *South Utah Mines & Smelters v. Beaver County*, *supra*:

If it be property whose production is uniform and of indefinite duration the capitalization of the net income derived from it at the going rate of interest, in the absence of a more certain method, will furnish a reasonable measure of the value.

The capitalization of the income of railroad property is the standard and recognized method of valuing it for purposes of taxation (*Louisville & Nashville R. Co. v. Greene*, 244 U. S. 522).

Let us, therefore, apply this method of valuation to the Dayton-Goose Creek property, as we may assume some court or commission would do, in the ascertainment of its true or economic value.

Its net railway operating income for 1921 amounted to \$72,948. The property, therefore, from the standpoint of income, was at that time the equivalent of a well-secured promissory note bearing and paying annual interest in the sum of \$72,948. The value of the note, or its principal sum, in ordinary commercial usage is ascertained by capitalizing the amount of the annual interest at the going rate, which may be assumed to be six per cent. The sum thus computed would be \$1,215,800. If we further assume that \$72,948 had been and would continue to be the annual income of the property, this amount, under the authorities above quoted, would justify a finding by court or commission that that was the value of the Dayton-Goose Creek property on the basis of its earning capacity. If it was earning the same amount prior to the passage of the Transportation Act, and its value fixed by court or commission at that sum as of that date, the prospective passage of that Act, with its recapture provision, would not reduce this value, because there would be no earnings in excess of six per cent. of such value, and hence no threatened loss of revenue by recapture. It was then, and still is, entitled to earn six per cent. on its true value; and it has earned that amount, and no more.

Let us go a step farther and assume that the earnings of the Dayton-Goose Creek property, instead of

continuing substantially the same from year to year, have an annual upward trend; that is, that the earnings of the property, as it is fair to assume is the case with the great majority of the railroads of the country, are increasing to some extent from year to year, and that the indications are that, based upon past experience and trends, its net earnings for 1922 will be greater than in 1921, and for 1923 greater than in 1922, and so on. In this event, a court or commission would be justified in finding that the economic value of the property in 1921 would be a greater sum than the capitalized earnings of that year; and as the immune six per cent. must needs be computed upon such greater value, it is even clearer that there would be no excess earnings subject to recapture. That this is so will appear from the following considerations.

A definition of value approved by experience is as follows:

The value of a thing is measurable by the sum of the amounts expected to be received from it, discounted to the time of expected receipt.

In the case of a progressive increase in net earnings after valuation date, 1921, an intending purchaser would make his computation of the amounts reasonably expected to be received from the operation of the railroad properties over a period of, say, ten years, estimating from the best available sources the probable net income for each year of the period, and would then discount these amounts to the time of expected receipt, and would estimate the value of the property accordingly. If the

increased earnings for a ten-year period succeeding 1921 could be ascertained with anything like accuracy, the value of the property could then be ascertained; the precise method to be employed being to add to the capitalized earnings for the year 1921 the present worth at six per cent. bank discount of the capitalization at six per cent. of the increase for each year. But, of course, future earnings must be estimated, and can not be ascertained with accuracy. But we are not concerned, for the moment, with the accuracy of the estimate. The fact that the earnings are increasing is sufficient in itself to demonstrate that the value of the property in 1921 should be something more than a capitalization of its net railway operating income of that year. By so much, therefore, is the property removed from the operation of the recapture provision.

5. *The Fifth Amendment prohibits the use of any "sum" or cost figure less than the true or economic value of the property.* Let us assume that the Commission decides to value all railroad property at its original cost, upon the theory that whatever was prudently invested in the property in the course of its history, and no more, is the investment which the law protects; in other words, exchange value, which bears a relation to the income which the property produces, is to be discarded, and original cost substituted therefor. What would be the result?

The first result immediately apparent would be that the railroads of the country would be valued upon different bases. Those constructed many years ago, when

prices of land, materials and labor were low, would be upon a lower basis, and those recently constructed under higher corresponding prices, would be upon a much higher basis. The old pioneer roads, which had first come into the field, and which have done the most to promote and develop the commerce of the country, would receive the least favorable treatment; the newest roads, which had recently come into existence, would become the favorites of the law.

But the most serious result of the application of this doctrine would be the utter confiscation of all property values in excess of original cost. For illustration, a railroad was constructed many years ago, when prices of land, materials and labor were comparatively low, and this railroad has brought about, or contributed to bringing about, the development and prosperity of the country which it serves, so that real estate prices have doubled or trebled, terminal properties have increased by leaps and bounds, and there has been an actual increase in the value of its land and physical property to the extent of \$1,000,000. But the road is to be limited to six per cent. upon its original cost, and by the time original cost is to be taken as value, the recapture provision may have sufficiently advanced and developed so that *all* in excess of six per cent. is taken by the Government; and nothing remains, therefore, to the carrier except six per cent. upon its "prudent" investment.

The effect, of course, would be to reduce the value of the property to the amount of its cost; no sane man would pay more than that for it, for the reason that it could not, under any circumstances, earn more than six

per cent. thereon. The \$1,000,000 enhanced value, or "unearned increment", as it is sometimes called, is wiped out. It is a typical case of confiscation. Can this be done consistently with the provisions of the Fifth Amendment?

The officials of the railroad might well point out that other owners of private property were permitted to share in the general prosperity of the country, and that the law protected them in the enjoyment of their property to its full economic value, even though such value had increased as the result of such general prosperity, and they might protest against the palpable injustice of applying one rule to the valuation of railroad property and another and more favorable rule to all other property. The stockholders might well point out that their investment in the railroad property, though deemed "prudent" in the eye of the law, was most unfortunate in fact, since it might have been made in other property which enjoyed the privilege of keeping pace with the general increase in values throughout the country.

The increase in value of railroad property over its original cost is not limited to increase in land values, as in the foregoing illustration, but extends to all other factors and elements which enter into and determine economic value. For illustration, a railroad was constructed many years ago, when prices were low, through a comparatively undeveloped part of the country, at a cost of \$50,000,000. Since its original construction, large and important cities have grown up along its line and at its terminals, a great number of important industries have been located on or adjacent to its line, its grades

have been reduced to three-tenths of one per cent., its cost of operation is extremely low in comparison with other companies, its traffic has increased many fold and is still increasing. This property, by reason of its location, its low grades, its very large volume of traffic, is able to earn handsome returns under rates under which its competitors can barely keep out of a bankruptcy court. Even if rates continue to be made so low as to barely enable its competitors to exist, this road will have current net earnings, and an assurance of a continuation and increase thereof in the future, sufficient to justify a economic value of \$500,000,000. It could be sold any day for that amount. If the Government should condemn it, it would be compelled to pay that amount, or more. It earned in the year 1922 a net railway operating income of \$30,000,000, which is six per cent. of its economic value, as above set forth, or sixty per cent. upon its original cost. Is it obliged to pay to the Government one-half of the excess of six per cent. upon its original cost, which would be \$13,500,000? Or may it say to the Government that the true or economic value of its property is \$500,000,000; it has earned six per cent. thereon; there are no excess earnings, and it owes the Government nothing? May it further say to the Government that the value of its private property—that is, the “full and true equivalent” of its private property—is \$500,000,000, and that, under these circumstances, to limit its value to its original cost of \$50,000,000 is nothing short of confiscation, prohibited by the organic law?

Under the Fifth Amendment, private property, measured by a value which is the full and perfect equivalent

therefor, may not be taken for public use without just compensation. The amendment is a limitation upon the power of the general government, and what the general government would have to pay in the event that it condemns a railroad property for public use is the measure of protection which the amendment affords when it undertakes to take the use of the property in the public interest, as it does when it fixes rates to be charged which are required to provide just compensation for such use. There can be no controversy over the character of the value of railroad property which the Government would be required to pay if it undertook to condemn it. It would be the true economic value, or exchange value, or pecuniary value, all of which mean market value, where that is available, or the equivalent of market value, where that is not available.

If the railroad property in either of the above illustrations were being condemned by the Government, and counsel for the Government should say that its value in such a proceeding is measured by the original cost, rather than by its higher market value or economic value, no one will contend that such a position would command serious consideration. Every one will concede that the true economic value, regardless of cost, is the only criterion in a condemnation case. This is so because the Fifth Amendment protects the owner of private property to the extent of its full and perfect pecuniary equivalent, which is its true economic value. But the same amendment affords the same protection to a railway company where the use of its property in the public interest is

being taken. In the one case, the title is taken for public use; and in the other, the use is taken in the public interest. The value which the amendment protects is precisely the same, and that value is determined by the rules applicable in condemnation proceedings.

Had the intention of the people in adopting the amendment been otherwise, different phraseology would have been employed. The "property" of which one shall not be deprived without due process of law, and the "private property" which may not be taken for public use without just compensation, would have been qualified by some such clause as "provided that Congress may fix the value of such property at such sum as it sees fit." This, of course, would have destroyed the protection afforded by the amendment. Congress could then constitutionally fix value at some insignificant sum.

The advocates of the cost theory of valuation might as well say that one-half of cost, or any other fraction thereof, should be taken as the value protected by the Fifth Amendment. If any sum less than true economic value of property can be taken as its value, then there is no limit beyond which the whittling down process may not go.

What is said above of original cost applies equally to cost of reproduction; cost of reproduction less depreciation, or any other cost figures, or any other arbitrary concepts of value less than the true economic value.

Respectfully submitted,

SAMUEL W. MOORE,
as Amicus Curiae.

25 Broad Street,
New York, N. Y.

October 20, 1923.

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WM. R. STANSBURY

CLERK

Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 330.

DAYTON-GOOSE CREEK RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, THE INTER-
STATE COMMERCE COMMISSION, AND RANDOLPH
BRYANT, United States District Attorney for the Eastern
District of Texas.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF

Directed to the proposition that the income-appropriation provisions of Section 15a of the Interstate Commerce Act are unconstitutional on the face of the statute because they fix as a just return a rate of return which is so low as to be confiscatory, and which, by reasons of its uniformity and consequent inflexibility, is so unreasonable as to constitute a taking of property without due process of law.

WINSLOW S. PIERCE,
LAWRENCE GREER,
F. C. NICODEMUS, JR.,
As Amici Curiae.

October 29, 1923.

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DISTRICT OF TEXAS.**

Statement.

By leave of Court, the undersigned, attorneys and counsellors of this Court, submit this brief as *amici curiae* in the interest and behalf of Wabash Railway Company, Western Maryland Railway Company and St. Louis Southwestern Railway Company, directed to the single question whether the rate of return fixed by the income-appropri-

tion provisions of Section 15a of the Interstate Commerce Act is a fair and just rate of return for all carriers subject to the Act.

The General Counsel of the Kansas City Southern Railway Company has filed a brief directed to the question of "the value of railroad property", to which the income-appropriation provisions of Section 15a are applicable.

Not conceding but ignoring for purposes of this argument, all questions as to the method to be adopted or the formula to be applied in ascertaining that "value" which is referred to in the income-appropriation provisions of Section 15a, and assuming that such "value" is properly ascertained and determined, it is our purpose to supplement the Kansas City Southern Company's argument, as well as the arguments contained in other briefs, asserting the unconstitutionality of these provisions, by a brief argument directed to the one controlling proposition that the statute is unconstitutional on its face because these provisions fix as a just return on such "value" a rate of return which is so low as to be confiscatory, and which by reason of its uniformity and consequent inflexibility is so unreasonable as to constitute a taking of property without due process of law.

ARGUMENT.

Insofar as Section 15a of the Interstate Commerce Act attempts to deprive a carrier of one-half of its net railway operating income in excess of six per cent. of the aggregate value of the railway property held for and used by the carrier in the service of transportation without regard to (a) the character and condition of the carrier; (b) the location of its railway property, and (c) the money rates and economic conditions prevailing where its railway property is situated, the statute is unconstitutional on its face.

Excepting only the argument originated by the Circuit Judges that the income-appropriation provisions of Section 15a are valid as an exercise of the taxing power, all of the arguments advanced in support of this statute are mere restatements of the proposition that Congress in the exercise of its power to regulate Commerce may lawfully confiscate a part of an interstate rail carrier's railway operating income, provided only that the part which remains unappropriated constitutes a fair return upon the aggregate value of the railway property held for and used by the carrier in the service of transportation.

An analysis of Section 15a will show conclusively that Congress legislated upon the assumption that a return of six per cent. upon the aggregate value of the carrier's railway property constitutes a fair return, and that any income in excess of six per cent. lies outside of the protection of the Fifth Amendment.

It is our contention that six per cent. is not a fair return upon railway property in any part of

the country, but if we are wrong as to this and it is believed that six per cent. is a fair return upon railway property in some parts of the country, then we submit that Section 15a is unconstitutional and void because it attempts to fix six per cent as a proper rate of return on railway property in every part of the country.

The subject of the rate of return protected by Fifth Amendment was considered by this Court in the recent case of *Bluefield Water Works & Improvement Company v. Public Service Commission of the State of West Virginia, et al.*, decided June 11, 1923, and this Court then held that six per cent. was not a fair return upon the value of property of a corporation serving water to the city of Bluefield, West Virginia, and its inhabitants.

Inasmuch as the part of the opinion in this case written by Mr. Justice Butler, relating to the rate of return, reviews all of the previous authorities and furnishes a complete text for the argument against the rate of return attempted to be fixed by Section 15a, we quote in full this part of the opinion:

“The state commission found that the company's net annual income should be approximately \$37,000, in order to enable it to earn 8 per cent for return and depreciation upon the value of its property as fixed by it. Deducting 2 per cent for depreciation, there remains 6 per cent on \$460,000, amounting to \$27,600 for return. This was approved by the state court.

“The company contends that the rate of return is too low and confiscatory. What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and

enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time, and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally.

"In 1909, this court in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 48-50, 53 L. ed. 382, 393, 399, 48 L. R. A. (N. S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034, held that the question whether a rate yields such a return as not to be confiscatory depends upon circumstances, locality, and risk, and that no proper rate can be established for all cases; and that, under the circumstances of that case, 6 per cent was a fair return on the value of the property employed in supplying gas to the city of New York, and that a rate yielding that return was not confiscatory. In that case the investment was held to be safe, returns certain, and risk reduced almost to a minimum,—as nearly a safe and secure investment as could be imagined in regard to any private manufacturing enterprise.

"In 1912, in *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655, 670, 56 L. ed. 594, 604, 32 Sup. Ct. Rep. 389, this court declined to reverse the state court where the value of the plant considerably exceeded its cost, and the estimated return was over 6 per cent.

"In 1915, in *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 172, 59 L. ed. 1244, 1253, P. U. R. 1915D, 577, 35 Sup. Ct. Rep. 811, this court declined to reverse the United States district court in refusing an injunction upon the conclusion reached that a return of 6 per cent per annum upon the value would not be confiscatory.

"In 1919, this court in *Lincoln Gas & E. L. Co. v. Lincoln*, 250 U. S. 256, 268, 63 L. ed. 968, 976, 39 Sup. Ct. Rep. 454, declined, on the facts of that case, to approve a finding that no rate yielding as much as 6 per cent on the invested capital could be regarded as confiscatory. Speaking for the court, Mr. Justice Pitney said:

'It is a matter of common knowledge that, owing principally to the World War, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future.'

"In 1921, in *Brush Electric Co. v. Galveston*, the United States district court held 8 per cent a fair rate of return.

"In January, 1923, in *Minneapolis v. Rand*, the circuit court of appeals of the eighth circuit (258 Fed. 818, 830) sustained, as against

the attack of the city on the ground that it was excessive, $7\frac{1}{2}$ per cent, found by a special master and approved by the district court as a fair and reasonable return on the capital investment—the value of the property.

“Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain, or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it. In this case the record shows that the rate of return has been low through a long period up to the time of the inquiry by the commission here involved. For example, the average rate of return on the total cost of the property from 1895 to 1915, inclusive, was less than 5 per cent; from 1911 to 1915, inclusive, about 4.4 per cent, without allowance for depreciation. In 1919, the net operating income was approximately \$24,700, leaving \$15,500, approximately, or 3.4 per cent on \$460,000 fixed by the commission, after deducting 2 per cent for depreciation. In 1920, the net operating income was approximately \$25,465, leaving \$16,265, for return, after allowing for depreciation. Under the facts and circumstances indicated by the record, we think that a rate of return of 6 per cent upon the value of the property is substantially too low to constitute just compensation for the use of the property employed to render the service.”

From the foregoing it is obvious that the six per cent. rate—the lowest this Court has ever approved—if not already obsolete by reason of changed conditions, cannot properly be accepted as a fair and constitutionally valid return upon the property of a rail carrier.

Every condition or consideration which this Court mentions as a justification for the six per cent. rate in the few cases in which it has been approved, is absent in the case of a rail carrier. The element of monopoly which is stressed by Mr. Justice Butler is wholly absent. The reverse of that condition is conspicuously present. The rail carrier enjoys no monopoly but, on the contrary, it conducts a business and devotes its property to a business which is highly competitive and which the Transportation Act, 1920, expressly provides shall continue to be competitive. The element of stability in earning power which is also stressed by Mr. Justice Butler is again absent. The rail carrier does not have an income so stable as to be "virtually guaranteed" (we quote Justice Pitney) but, on the contrary, its income is subject to violent fluctuations in response to the changing tides of commerce. Although in times of business depression our great urban populations must continue to consume gas, light and power at usual and customary rates, railway revenues may be held at a level so low that even the so-called "strong roads" cannot earn the expenses of operation.

Disregarding the uncertain, if not mercurial character of railway revenues and railway operating income, Section 15a attempts to put the rail carrier in the same category as a monopoly with an income "virtually guaranteed" and as-

serts congressional power to confiscate in any year the income in excess of six per cent. although for a long period of previous years the carrier's income may have fallen below six per cent. Obviously, this statute, if it becomes effective, will operate to prevent a carrier from setting up proper reserves out of the earnings of prosperous years to cover periods of depression, so that sooner or later the accumulated surpluses of even the so-called "stronger roads" will yield to the attrition of lean years and our rail transportation systems will be legislated into receivership and bankruptcy.

Plainly, a rate of return which is fair and just for a monopolistic, non-competitive enterprise with an earning power "virtually guaranteed" and so situated that "the risk is reduced almost to a minimum" is confiscatory when applied to a rail carrier subject to the countless vicissitudes of interstate commerce.

In the New York Consolidated Gas Company case Mr. Justice Peckham, in that part of his opinion quoted by Mr. Justice Butler, says that no proper rate of return can be established for all cases. Yet that is precisely what Congress attempts to do under the income-appropriation provisions of Section 15a—it attempts to fix for all cases and for all carriers the six per cent. rate as the level above which legislative confiscation of railway income is beyond the protection of the Fifth Amendment. Thus it arbitrarily fixes a rate applicable to all carriers throughout the country, which rate, by reason of its uniformity and consequent inflexibility, must necessarily disregard the character and condition of the individual carrier, the location of its railway property and

the money rates and economic conditions prevailing where its railway property is situated, all of these being vital factors which this Court says cannot be disregarded.

For the foregoing reasons we contend that the income-appropriation provisions of Section 15a should be declared unconstitutional on the face of the Act.

Respectfully submitted,

WINSLOW S. PIERCE,
LAWRENCE GREER,
F. C. NICODEMUS, JR.,
as Amici Curiae.

37 Wall Street,
New York, N. Y.

October 29, 1923.

DAYTON-GOOSE CREEK RAILWAY COMPANY *v.*
UNITED STATES, INTERSTATE COMMERCE
COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS.

No. 330. Argued November 16, 19, 1923.—Decided January 7, 1924.

1. The power of Congress to regulate interstate commerce includes the power to foster, protect and control it, with proper regard for the welfare of those who are immediately concerned as well as of the public at large. P. 478.
2. Section 422 of the Transportation Act 1920, by the new section, 15a, added by it to the Interstate Commerce Act, directs the Interstate Commerce Commission: To establish rates which will enable the carriers, as a whole, or by rate groups or territories fixed by the Commission, to receive a fair net, operating return upon the property they hold in the aggregate for use in transportation (par. 2); to establish from time to time the percentage of the value of the aggregate property constituting a fair operating return, the act, however, fixing it for the years 1920 and 1921, at 5½%, with discretion in the Commission to add one-half of 1%, as a fund for adding betterments on capital account, (par. 3); and to fix, from time to time, such aggregate property value. The said § 15a provides further: That, because it is impossible to establish uniform rates on competitive traffic, adequate to sustain all the carriers needed for the business, without giving some an income in excess of a fair return, any carrier receiving such excess shall hold it as trustee for the United States, (par. 5); that such excess shall be distributed, one-half to the carrier as a reserve fund, the other half to a general railroad revolving fund, to be maintained by the Commission, (par. 6); that the carrier may use such reserve to pay dividends, interest on securities, or rent for leased roads, to the extent that its net operating income for any year is less than 6%, (par. 7); and whenever such reserve equals 5% of the value of its property, and while it so continues, the carrier's one-half of excess

income may be used for any lawful purpose, (par. 8); that the general revolving fund shall be administered by the Commission in making loans to carriers to meet expenditures on capital account, to refund maturing securities originally issued on capital account, and for buying equipment and facilities and leasing or selling them to carriers, (pars. 10-17).

- Held:* (a) The provisions for "recapture" and use of excess income are essential to the plan of the act, which aims for an efficient national transportation system, and therein seeks to maintain uniform rates, for all shippers, as a means of distributing traffic and avoiding congestion on the stronger railroads, while keeping the net returns of the railroads, whether strong or weak, to the varying percentages that are fair for them, respectively. P. 479.
- (b) Rates which, as a body, enable all the railroads necessary to do the business of a rate section, to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are, in their general level, reasonable from the standpoint of the individual shipper in that section. P. 480.
- (c) The statute leaves the reasonableness of each particular rate open to inquiry independently of the net return to the carrier from all. Pp. 480, 483.
- (d) A railroad, however strong financially, economical in facilities, or favorably situated as to traffic, is not entitled as of constitutional right to more than a fair, net operating income upon the value of its properties devoted to transportation. P. 481.
- (e) Decisions holding that the fact that the revenue of a carrier from both local and interstate commerce gave a fair profit was irrelevant to the question whether the intrastate rates were unreasonably high or low, do not make against the use of a fair return of operating profit, as a standard of reasonableness of rates, when the issue respects the general level of all the rates received by the carrier. P. 483.
- (f) The *net* operating profit accruing to a carrier from its whole rate structure is relevant evidence in determining whether the sum of the rates is fair to the carrier; reduction of excessive profit, as provided by the act, is tantamount to reducing the rates proportionately before collection. P. 483.
- (g) Under the statute, excess income is taken in trust, and the carrier never has such a title to it as to render its recapture by the Government a taking without due process, in violation of the Fifth Amendment. P. 484.

- (b) Inasmuch as the part of the excess income retained by the Government belongs equitably to neither carriers nor shippers, it may properly be devoted by the Government, as the act provides, to help the weaker railroads more effectively to discharge their public duties. P. 484.
- (i) The recapture clause does not, by reducing net income from intrastate rates, invade the reserved power of the States, in violation of the Tenth Amendment, but, in view of its relation to the plan and national purpose of the act, is within the power of Congress over interstate commerce. P. 485.
- (j) Absence of provision in the act itself for judicial hearing on the fairness of the return is not a constitutional objection, since the steps prescribed amount to a direct and indirect legislative fixing of rates, and resort to the courts on the question of confiscation is left open, under Jud. Code, §§ 208, 211. P. 485.
- (k) Limitation of the return to 6%, on the property of a public utility, is not necessarily confiscatory. P. 486.
- (l) In this case, the issue of confiscation, not having been raised in the complaining carrier's bill, is not before the Court; but, *semble*, that 8% on the property value reported by the carrier, remaining to it after paying the one-half excess income to the Commission, is not confiscatory. P. 486.
- (m) To attack the return allowed, upon the ground that the property valuation upon which it was computed was too low, the bill should allege the true values. P. 486.
- (n) Whether the property values reported by a carrier to the Commission, upon which its net income was calculated, were understated, is a question of fact, to be decided, primarily, at least, by the Commission, and which cannot be considered by the Court when the carrier has not invoked the Commission's decision upon it. P. 487.

287 Fed. 728, affirmed.

APPEAL from a decree of the District Court which dismissed a bill brought by the appellant Railway Company attacking the constitutionality of orders made by the Interstate Commerce Commission under the Transportation Act, and praying that the United States, the Commission and a United States district attorney be enjoined from prosecuting civil or criminal actions to enforce the orders.

Mr. Frank Andrews and Mr. Robert J. Cary, with whom Mr. Robert H. Kelley and Mr. F. C. Nicodemus, Jr., were on the briefs, for appellant.

I. The property of appellant, held for and used in the service of transportation during the periods here involved, has remained at all times appellant's private property, protected as such by the Fifth Amendment.

The income produced by that property, and the revenues accruing from its use, are likewise private property and likewise protected. *Branson v. Bush*, 251 U. S. 182; *Cleveland, etc. Ry. Co. v. Backus*, 154 U. S. 439; *Omnia Co. v. United States*, 261 U. S. 502; *South Utah Mines v. Beaver County*, 262 U. S. 325; *Monongahela Co. v. United States*, 148 U. S. 312; *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Minnesota Rate Cases*, 230 U. S. 352; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307; *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585.

II. The provisions of the Transportation Act for the disposition of net railway income are not a regulation of interstate commerce, but a direct taking of the private property of the carrier, and of the liberty of the use of the property of the carrier, without due process of law and without just compensation.

The dominant purposes of Congress were to release the railroads from governmental operation, and to prevent the transportation system of the country from being wrecked. See *Wisconsin R. R. Comm. v. Chicago, Burl. & Q. R. R. Co.*, 257 U. S. 563; Senate Committee Report No. 304, Senate Bill 3288. Congress was initiating a new and a different policy from any which had theretofore been recognized by national legislation. *New England Divisions Case*, 261 U. S. 184.

The contention urged in the Senate Committee report, *supra*, that Congress may "declare that the income

which any particular carrier receives beyond a fair return upon the value of its property, it receives as a trustee for the public and not as its own absolute property," overlooks the elemental considerations of the powers of Congress under the Constitution.

A carrier has no right to collect, or to demand of the shipper, a rate that is not in and of itself reasonable for the service. The Commission has no right to fix, and Congress has no power to compel the shipper to pay, a rate that is not reasonable for the service. Nor may Congress take from the shipper for governmental purposes anything that is more than reasonable for the service. Therefore, the carrier has no right to collect an excess service charge and hold the excess as trustee for the United States. See §15a, par. 17. If the earnings of the carrier arise from reasonable charges for service rendered, such earnings are the private property of the carrier, which cannot, by congressional declaration or otherwise, be made a trust fund for the United States or for any other purpose. The taking of property of the carrier is not a regulation of commerce. Sections 5 and 6 do not regulate. They take the income of the carrier already earned, appropriate one-half of it to the Government, and limit the uses of the other half. The limitations are as much a taking of the carrier's property as the appropriation of it direct to the Government.

Whence comes the power of Congress to make this declaration of trust? The power cannot be defended on the proposition that it is only a part of the machinery for fixing rates. The excess is not to be returned to the persons who paid excessive provisional charges; and the act itself does not authorize excessive provisional charges, but directs that charges be fixed by the Commission, "in the exercise of its power to prescribe just and reasonable rates." Rate regulation cannot be indulged in to enrich the treasury of the Government. As

it has been practiced in this country, it is, in theory at least, designed to protect shippers from unreasonably high rates and to protect carriers from unreasonably low rates.

The general level of rates, state and interstate, under which appellant's earnings accrued to it between March 1, 1920, and December 31, 1921, must be assumed to be just and reasonable and may not be assumed to be excessive.

For all practical purposes, these rates were absolutely fixed by the Commission subject to the obligation of the carriers to correct maladjustments. But it is immaterial whether they were fixed or were merely authorized, because in either event they must have received the express approval of the Commission. The discretion of the Commission with respect to such administrative matters is not subject to review by the courts.

The rates and charges under which the appellant earned the income were not excessive, and there is no basis of law or fact for assuming that they were otherwise than just, fair and reasonable, except, perhaps, where the shippers in particular instances may be entitled, under the Interstate Commerce Act, to secure from the Commission an order of reparation requiring the carrier to refund any excess which the Commission may find to have existed in those cases. But the questions of whether any excess did exist, and if so how much it was, have by law been committed exclusively to the determination of the Commission. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426.

The restrictions placed by § 15a upon the use of the moneys thereby required to be placed in a reserve fund, constitute a taking of property under the Fifth Amendment, because an undue limitation upon the use of property is equivalent under the Constitution to a seizure of

the property. *Branson v. Bush*, 251 U. S. 182; *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Kansas Gas Co. v. Haskell*, 172 Fed. 545; *West v. Kansas Gas Co.*, 221 U. S. 229; *St. Louis v. Hill*, 116 Mo. 527; *Spann v. Dallas*, 111 Tex. 350; *Carey v. Atlanta*, 143 Ga. 192; *State v. Darnell*, 166 N. C. 300; *Chicago, M. & S. P. Ry. Co. v. Minnesota*, 134 U. S. 418; *United States v. Cress*, 243 U. S. 316; *United States v. Lynah*, 188 U. S. 445.

The "due process" clause of the Fifth Amendment requires equal legislation affecting generally and in like manner all those in similar circumstances, and to this extent the Fifth Amendment, which does not expressly contain an equal protection clause, is as broad as the Fourteenth Amendment, in which the principle is expressly stated. *Taylor, Due Process*, § 134; *Leeper v. Texas*, 139 U. S. 462; *Giozza v. Tiernan*, 148 U. S. 657; *Cass Co. v. Detroit*, 181 U. S. 396; *Tonawanda v. Lyon*, 181 U. S. 389; *Commodities Clause Cases*, 213 U. S. 366; *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1; *Wilson v. New*, 243 U. S. 332.

A classification of carriers, for rate-fixing purposes, solely upon the basis of their net earnings, for performing a similar service under like conditions in the same territory, is arbitrary and unequal, and therefore takes property without due process, in violation of the Fifth Amendment. *Cotting v. Godard*, 183 U. S. 79.

The act deprives appellant of its property without due process by reason of the entire lack of provision for adjusting the actual earnings to the earnings as shown by the books shortly after the close of the annual accounting period. Sufficient account is not taken of deferred claims against the carrier, which should be charged against the surplus. *Sweet v. Rechel*, 159 U. S. 380; *Chicago, M. & St. P. Ry. Co. v. Wisconsin*, 238 U. S. 491.

III. The statute is unconstitutional as to appellant and therefore the orders entered in pursuance thereof are void

as a violation of the Tenth Amendment, because the recapture provision applies to the net income which is derived from the conduct of intrastate as well as interstate and foreign business, and operates as a limitation upon the earning power of a Texas corporation with respect to its business done wholly within that State. The proper regulation of interstate and foreign commerce by Congress and its agencies has no such real or substantial relation to high or excessive earnings on purely state business as will justify any limitation upon them by the Federal Government. *Adair v. United States*, 208 U. S. 161; *Mondou v. New York, etc. R. R. Co.*, 223 U. S. 1; *Shreveport Case*, 234 U. S. 342; *Mugler v. Kansas*, 123 U. S. 623; *Wisconsin Rate Case*, 257 U. S. 563; *Nathan v. Louisiana*, 8 How. 73; *Galveston, etc. Ry. Co. v. Texas*, 210 U. S. 217; *Greene v. Louisville, etc. R. R. Co.*, 244 U. S. 499; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441; *Hammer v. Dagenhart*, 247 U. S. 251; *Bailey v. Drezel Co.*, 259 U. S. 20. *Noble State Bank v. Haskell*, 219 U. S. 104, distinguished. See also *Keller v. United States*, 213 U. S. 138.

IV. Section 15a does not levy or impose a tax and is not an exercise of the taxing power of Congress. See *New England Divisions Case*, 261 U. S. 184.

V. The orders of the Commission of January 16th and March 16th, 1922, expressly direct and require that, within a fixed time, one-half of all excess earnings, shown by the reports called for in such orders, shall be paid to the Commission, and inferentially direct and require that the other one-half of the excess earnings so shown be placed in the reserve fund contemplated by § 15a.

VI. Appellant is entitled to an injunction against the penalties and prosecutions which will be inflicted upon it and its officers if it continues its refusal to observe the directions of § 15a and of the orders of the Commission respecting the payment of money to the Commission and into a reserve fund.

VII. This record shows conclusively that the true value of appellant's property, held for and used in the service of transportation during the respective periods involved, substantially exceeded the amount upon the basis of which appellant's so-called excess earnings, have been computed. Therefore, a failure to accord relief herein would result in taking, as so-called excess earnings, portions of appellant's private property not justified or required by the terms of the act in question, without due process of law, in violation of the Fifth Amendment, even if the act be held valid for all purposes. *Southwestern Bell Tel. Co. v. Public Service Comm.*, 262 U. S. 276.

It is alleged in the bill that the so-called value upon which the Commission computed its claim for excess earnings was not the true value of complainant's property, and, this allegation being taken as true upon defendant's motion to dismiss the bill, it necessarily follows that the lower court erred in sustaining the motion. Foster, Federal Practice, 6th ed., § 366; *Detroit United Ry. v. Detroit*, 248 U. S. 429; *United States v. Railway Employés' Dept.*, 286 Fed. 228; *Krouse v. Brevard Co.*, 249 Fed. 538; *Stromberg v. Holley*, 260 Fed. 220.

The Commission erred in arbitrarily adopting cost of road and equipment as the true value of the complainant's property, and therefore its order based thereon is unlawful, and its enforcement should be enjoined. Value is not measured by cost. *Southwestern Bell Tel. Co. v. Public Service Comm.*, 262 U. S. 276; *Bluefield Water Works Co. v. Public Service Comm.*, 262 U. S. 679; *Georgia Ry. Co. v. Railroad Comm.*, 262 U. S. 625; *Smyth v. Ames*, 169 U. S. 546.

Mr. P. J. Farrell for the Interstate Commerce Commission.

I. The orders were made by the Commission as a procedural step deemed by it necessary and appropriate for

the purpose of enforcing, in so far as with it lies, the provisions of § 15a of the Interstate Commerce Act, but do not, in and of themselves, require appellant to pay into a reserve fund or to the Commission any sum or sums of money.

II. The requirements contained in the orders are fully supported by the authority conferred upon the Commission by the act, and are in accordance with the duties imposed upon the Commission by par. 9 of § 15a.

III. Appellant is not required by either the provisions of § 15a or the orders of the Commission to include income arising from non-carrier sources in excess net railway operating income.

IV. In *Ex parte* 74, 58 I. C. C. 220, the Commission did not fix the rates, fares, and charges for the transportation of passengers and property by railroad in the group in which appellant's railroad is located.

V. In so far as changes should be made in the valuation of appellant's property, appellant is fully protected by a provision contained in the orders of the Commission. As for any payments appellant may be required to make of claims accrued during the periods covered by the orders, appellant is fully protected by special instructions contained in the Commission's "Classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914."

Since, in the ordinary course of business, sums of money paid by a carrier on account of claims like those referred to by appellant are included in the carrier's accounts for the years, respectively, in which the payments are made, regardless of the dates upon which the claims accrue, it appears to be a reasonable assumption that there are included in the reports made to the Commission by appellant, for the periods covered by the orders of the Commission involved in this case, sums of money paid by appellant during those periods on account of claims which accrued in some prior period or periods.

VI. Income derived by appellant from intrastate traffic may properly be included in the basis upon which appellant's excess net railway operating income is computed. *Wisconsin R. R. Comm. v. Chicago, B. & Q. R. R. Co.*, 257 U. S. 563.

VII. The provisions of § 15a relating to excess net railway operating income are constitutional and the orders of the Commission are valid.

As stated by this Court in the *Wisconsin Case*, *supra*, the end sought to be accomplished by Congress in framing the Transportation Act, including the provisions of § 15a, was to maintain an adequate national railway system. That this end is legitimate, and that the provisions referred to are appropriate and plainly adapted to that end, is equally clear. It will be seen that, in prescribing rates, the Commission is both authorized and required to use as a basis the aggregate value of the railroad property of the carriers held for and used in the service of transportation, as a whole, or as a whole in each of such rate groups or territories as the Commission may from time to time designate, instead of, and as distinguished from, the value of the property of an individual carrier. It is therefore apparent that appellant's contention, that, as between appellant and the Commission, the general level of rates in the group where appellant's railroad is located must be presumed to be reasonable, is unsound and cannot be sustained.

Regardless of the power of Congress to provide for the levying and collecting of taxes, we think it is apparent that the provisions of § 15a, whose validity is called in question by appellant, may be upheld as portions of a scheme of regulation of interstate and foreign commerce which Congress has a constitutional right to create and put in force.

Mr. Solicitor General Beck, with whom *Mr. Blackburn Esterline*, Assistant to the Solicitor General, was on the brief, for the United States.

Whether an adequate system of railway transportation throughout the continental United States shall be maintained and, to that end, whether the Transportation Act is a valid exercise of congressional power, is the question. Whether a particular clause of that act is constitutional when torn from its setting, is decidedly not the question.

The act stands before the Court with all of the presumptions of validity. *Nicol v. Ames*, 173 U. S. 509. Moreover, it has thrice been sustained in practically all of its aspects. *Wisconsin R. R. Comm. v. Chicago, B. & Q. R. R. Co.*, 257 U. S. 563; *Pennsylvania R. R. Co. v. Railroad Labor Board*, 261 U. S. 72; *New England Divisions Case*, 261 U. S. 184.

The appellant alleges itself to be a common carrier by railroad subject to the lawful provisions of the Transportation Act and all other lawful acts of Congress regulating railroads engaged in interstate and foreign commerce. Congress, therefore, has the power to regulate it. *St. Louis S. W. Ry. Co. v. United States*, 245 U. S. 136; *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186.

The broad purposes of the Transportation Act are repeatedly recited throughout the act. 41 Stat. 476, 477, 482, 488, 489, 491. [Counsel reviewed the history of the times under which Congress acted and the legislative history of the Transportation Act. See *Stafford v. Wallace*, 258 U. S. 513.] The Congress was avowedly considering the transportation system throughout the continental United States as a whole. To hold that the Congress enacted the broad provisions to raise revenue, to prescribe divisions, to provide for settlement of disputes between carriers and their employees, and for other equally important purposes, in order to maintain an adequate transportation system, and then to annul and strike down the standard or basis for which these enormous increased revenues are to be raised and equitably distributed or

placed, would defeat the whole intention of the Congress and bring about a situation more destructive to the public interest than if no part of the act had ever been passed.

Never in its history has Congress enacted a statute in which the sections were so closely interlocked and dependent each upon the other. If paragraphs 5 and 6 of § 422 are torn from the body of the act, the whole foundation of the entire legislative scheme fails.

In cases thus far decided, both the District Courts and this Court, in approaching the subject, have persistently exercised the judicial power with a scope coextensive with the congressional enactment, and have kept the entire act and all of the carriers subject thereto in full view at all times, to the end that all of the incidents to the development of an adequate transportation system may move forward at once and together. The statute is not to be interpreted and executed along restricted and narrow lines when dealing with such a complex and stupendous subject.

In *Wisconsin R. R. Comm. v. Chicago, B. & Q. R. R. Co.*, 257 U. S. 563, paragraphs 3 and 4 of § 13, and § 15a, were assailed, but this Court sustained the validity of the act in all respects. See also *Pennsylvania R. R. Co. v. Railroad Labor Board*, 261 U. S. 72; *New England Divisions Case*, 261 U. S. 184.

The proceedings before the Commission and in the District Court, the arguments in the briefs of counsel and at the bar, and the opinion of this Court, all show that § 15a, practically in its entirety, was involved in the *New England Divisions Case*. What this Court said concerning the so-called "recapture clause", and other paragraphs of that section, was not inadvertence, but squarely within the issues made by the parties. To sustain the contentions or any substantial part of them, now advanced by appellant and the numerous *amici curiae*, would be to overrule the *New England Divisions Case*. The opinion in that case is just as conclusive

of the validity of the recapture paragraphs as if those paragraphs had been the immediate subject of the controversy instead of the so-called divisions paragraphs. The Commission there considered the respective needs of the several carriers in the distribution of the revenue, after it was acquired by the carriers and before the net railway operating income reached 6% of the value of the railway property held for and used by each carrier in the service of transportation. In the instant case the net has exceeded 6%. The constitutional rights of the complainant under the Transportation Act have thus been fully satisfied. The whole controversy is over the overflow. Thus, the questions disposed of in the *New England Divisions Case* reached heights far beyond anything now claimed by the appellant and the *amici curiae* under the recapture clause. If the Congress may authorize the Commission to direct the distribution among the weaker lines of much needed earnings to maintain an adequate transportation system, *a fortiori*, it may direct the recapture of excess earnings of those who have waxed fat under the Transportation Act. Swollen earnings derived from necessarily general rates for transportation, which the public must pay, are not guaranteed by the Constitution.

Paragraphs 5 and 6 may not be segregated from the paragraphs which have already been upheld. *Hill v. Wallace*, 259 U. S. 44; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

It cannot seriously be argued that paragraphs 3 and 4 of § 13, paragraph 6 of § 15, and § 15a, of the Interstate Commerce Act, as amended by the Transportation Act, are not integral parts of the machinery; that is, the raising of the revenues, the fixing of the divisions, and the recapture of the excess earnings, all stand together. Opposing counsel, therefore, are wedged between the nonsegregation of these several paragraphs,

on the one side, and the opinions of this Court in the *Wisconsin Rate Case* and the *New England Divisions Case*, on the other side.

Moreover, it is conceded that paragraphs 2, 3, and 4 of § 15a undoubtedly constitute a regulation of commerce. The argument is that unconstitutionality begins at the point at which the so-called constitutional guaranty stops.

The Commission has found the value of the steam railway property subject to the act and held for and used in the service of transportation at approximately \$18,900,000,000. *Ex parte 74*, 58 I. C. C. 229. The exercise of the power of Congress, which authorizes the Commission to increase rates to the public, so as to earn a net return to each carrier of 6% on the valuation, cannot in this proceeding be successfully challenged as confiscatory. The act was passed in the public interest, which includes the interest of the carriers. *Interstate Commerce Comm. v. Chicago, R. I. & P. Ry. Co.*, 218 U. S. 109; *Minnesota Rate Cases*, 230 U. S. 441, 467, 471.

There are those who contend that, if all the railroads were placed in a single system, it would be unconstitutional for Congress to impose upon them a scheme of rates which would yield less than a fair return upon the aggregate value; that the instant case is not different in principle because of the separation of the railroads into different systems; therefore the recapture clause is invalid, because it takes from some roads part of their earnings and leaves to the roads in the aggregate less than the fair return upon the property in the aggregate. Congress deals with the situation as it finds it. With the railroads divided into separate systems, there is no constitutional obligation on Congress to make rates which will yield and leave in the hands of the railroads in the aggregate a fair return on the aggregate value.

Again, it has been said that the true rate-making rule is to make rates upon the basis of the average results of

all the carriers, and anything that any carrier earns under this rule is its property and cannot be taken away. Courts will not limit in this way the right of Congress to select the means of exercising its constitutional powers; nor will they declare that any given rule of rate making is the only rule. There is no reason for the courts to say that Congress is prohibited from adopting some other rule of rate making, as, for example, that rates on prosperous roads shall be only such as will yield them a fair return; in which event competition would force corresponding rates on the weak roads.

It has also been suggested that Congress has not the power to bankrupt the railroads by fixing rates for the prosperous roads which, while constitutional as to them, would, through competitive influences, leave other roads without a fair return. There can be no such operation of the constitutional principle. The Government might buy and operate a railroad between Chicago and New York and might charge exceedingly low rates. This might be disastrous to other railroads, but how could it be said that their property had been taken by legislative enactment without due process of law merely because they, as the result of competition, had been unfavorably affected by an act of the Government which in itself would be entirely lawful?

The Transportation Act was designed to help the transportation situation, and did help it. If the railroads had gone back to private control without the specific rate-making rule prescribed in the Transportation Act, the railroads could not have increased their rates to anything like the extent they were permitted to increase them under the Transportation Act. If the more fragmentary rules which had theretofore been applied had been applied to the new situation, it is perfectly clear that the net increase would have been much smaller. It would be surprising if a rule which was intended to be more liberal

in practice to the railroads, and which in fact was more liberal to them, should be regarded as unconstitutional, when the rules theretofore in effect of a more fragmentary character and affording less protection to the carriers would be regarded as constitutional.

If there are any carriers which have a constitutional right to object to the rule of the Transportation Act, they are the weaker carriers, because the act makes it practically certain that rates will not be high enough to give them a fair return. But those carriers are not objecting, and in the nature of things will not object, because the rule gives them more than they would otherwise get in practice. And it is impossible to see how carriers which are getting more than they are constitutionally entitled to, can say that the rule that gives them that amount is unconstitutional.

Decisions are legion, and Congress took notice of them in enacting the Transportation Act, on the subject of the right of carriers to earn a fair return on the value of the property used in the service of the public. See *Chicago, M. & S. P. Ry. Co. v. Minnesota*, 134 U. S. 418; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466; *Galveston Elec. Co. v. Galveston*, 258 U. S. 388; *Minnesota Rate Cases*, *supra*. Likewise with respect to the classification of railroads. *Chicago, B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155; *Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339; *Dow v. Beidelman*, 125 U. S. 680. Each individual case must rest upon its own peculiar facts and circumstances. *Covington, etc. Co. v. Sandford*, 164 U. S. 578.

The principle upon which the recapture clause was founded was not unknown to our law. See *Noble State Bank v. Haskell*, 219 U. S. 104; *Mountain Timber Co. v. Washington*, 243 U. S. 219.

Counsel argue that the statutory half-and-half division between the Government and the company of the excess

earnings is arbitrary, and that, if sustained, it might subsequently be revised, and the proportion of the company from time to time be so reduced as to reach zero. Similar arguments in other cases have been rejected as irrelevant. *Atlantic Coast Line R. R. Co. v. Corporation Comm.*, 206 U. S. 1; *Noble State Bank v. Haskell*, 219 U. S. 104.

Likewise the argument may not prevail that appellant, owing to claims and suits for loss and damage, overcharges, etc., may not close records and submit reports of earnings for a specified year because of undetermined liability, as it presents a general administrative question which clearly belongs to the rules and regulations of the Interstate Commerce Commission covering such matters. The Court would not determine such questions in advance of the facts of the particular case.

Opposing counsel try to make much of the language of the District Court that the recapture of the excess earnings was in the nature of a tax. One of the briefs points out that the Interstate Commerce Commission has not become a tax assessor and collector, that, as the moneys are not paid into the Treasury by the carriers and paid out by the Treasurer, there is no tax, hence the District Court erred. The tax referred to in the *New England Divisions Case*, is very much the same as the tax referred to in the *Mountain Timber Case*. The point does not require further discussion.

There is little in the briefs of opposing counsel which meets the holding of the District Court that appellant never acquired title to the fund as its absolute property but that it holds the same as trustee for the United States.

The Transportation Act does not interfere with intrastate commerce. *Wisconsin Rate Case*, 257 U. S. 587.

Mr. Samuel W. Moore, by leave of Court, filed a brief for the Kansas City Southern Railway Company, as *amicus curiae*.

Messrs. Joseph Paxton Blair, Edgar H. Boles, John F. Bowie, Robert J. Cary, Henry W. Clark, Herbert Fitzpatrick, Lawrence Greer, W. S. Horton, William S. Jenney, E. W. Knight, Richard V. Lindabury, Will H. Lyford, Samuel W. Moore, William Church Osborn, Winslow S. Pierce, Henry V. Poor, John H. Agate and Carl A. de Gersdorff, by leave of Court, filed a brief for the numerous railroad companies named in the footnote, *post*, 475, as *amici curiae*.

Mr. Winslow S. Pierce, Mr. Lawrence Greer and Mr. F. C. Nicodemus, Jr., by leave of Court, filed a brief for the Wabash Railway Company, the Western Maryland Railway Company, and the St. Louis Southwestern Railway Company, as *amici curiae*.

Mr. John G. Milburn and Mr. Forney Johnston, by leave of Court, filed a brief for the National Association of Owners of Railroad Securities, as *amici curiae*.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The main question in this case is whether the so-called "recapture" paragraphs of the Transportation Act of 1920, c. 91, § 422, § 15a, paragraphs 5-17, 41 Stat. 456, 489-491, are constitutional.

The Dayton-Goose Creek Railway Company is a corporation of Texas, engaged in intrastate, interstate and foreign commerce. Its volume of intrastate traffic exceeds that of its interstate and foreign traffic. In response to orders of the Interstate Commerce Commission, the carrier made returns for ten months of 1920, and for the full year of 1921, reporting the value of its railroad property employed in commerce and its net revenue therefrom. It earned \$21,666.24 more than six per cent. on the value of its property in the ten months of 1920, and \$33,766.99

excess in the twelve months of 1921. The Commission requested it to report what provision it had made for setting up a fund to preserve one-half of these excesses, and to remit the other half to the Commission.

The carrier then filed the present bill, setting forth the constitutional invalidity of the recapture provisions of the act and the orders of the Commission based thereon, averring that it had no adequate remedy at law to save itself from the irreparable wrong about to be done to it by enforcement of the provisions, and praying that the defendants, the United States, the Interstate Commerce Commission, and the United States District Attorney for the Eastern District of Texas, be temporarily restrained from prosecuting any civil or criminal suit to enforce the Commission's orders, and that the court on final hearing make the injunction permanent. The Commission answered the bill. The United States and the District Attorney moved to dismiss it for want of equity jurisdiction, and for lack of equity. An application for an interlocutory injunction before a court of three judges under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220, was denied and the court, proceeding to consider the equities, dismissed the bill.

The question of equity jurisdiction raised below has not been discussed here by counsel for the appellees either upon their briefs or in oral argument. They do not rely on it, but seek without delay a decision on the merits.

While the Dayton-Goose Creek Railway Company was the sole complainant below and is the sole appellant here, nineteen other railway companies have, as *amici curiae*, upon leave granted, filed briefs in support of its appeal. Their names appear in the margin.¹

¹ Southern Pacific Company; Lehigh Valley Railroad Company; Western Pacific Railroad Corporation; New York Central Railroad Company; Union Pacific Railroad Company; Chesapeake & Ohio Railway Company; Western Maryland Railway Company; Illinois

By § 422 of the Transportation Act, there was added to the existing Interstate Commerce Act and its amendments, § 15a. The section in its second paragraph directs the Commission to establish rates which will enable the carriers, as a whole or by rate groups or territories fixed by the Commission, to receive a fair net operating return upon the property they hold in the aggregate for use in transportation. By paragraph 3, the Commission is to establish from time to time and make public the percentage of the value of the aggregate property it regards as a fair operating return, but for 1920 and 1921 such a fair return is to be five and a half per cent., with discretion in the Commission to add one-half of one per cent. as a fund for adding betterments on capital account. By paragraph 4, the Commission is to fix the aggregate value of the property from time to time, using in doing so the results of its valuation of the railways as provided in § 19a of the Interstate Commerce Act, so far as they are available, and all the elements of value recognized by the law of the land for rate-making purposes, including so far as the Commission may deem it proper, the investment account of the railways.

Paragraph 5 declares that, because it is impossible to establish uniform rates upon competitive traffic which will adequately sustain all the carriers needed to do the business, without giving some of them a net income in excess of a fair return, any carrier receiving such excess shall hold it in the manner thereafter prescribed as trustee for the United States. Paragraph 6 distributes

Central Railroad Company; Delaware, Lackawanna & Western Railroad Company; Virginian Railway Company; Duluth, Missabe & Northern Railway Company; Chicago & Eastern Illinois Railway Company; Kansas City Southern Railway Company; El Paso & Southwestern Railroad Company; St. Louis Southwestern Railway Company and Wabash Railway Company; Pere Marquette Railway Company; New York, Chicago & St. Louis Railroad Company; and the New Orleans, Texas & Mexico Railway Company.

the excess, one-half to a reserve fund to be maintained by the carrier, and the other half to a general railroad revolving fund to be maintained by the Commission. Paragraph 7 specifies the only uses to which the carrier may apply its reserve fund. They are the payment of interest on bonds and other securities, rent for leased lines, and the payment of dividends, to the extent that its operating income for the year is less than six per cent. When the reserve fund equals five per cent. of the value of the railroad property, and as long as it continues to do so, the carrier's one-half of the excess income may be used by it for any lawful purpose. Under paragraph 10, and subsequent paragraphs, the general railroad revolving fund is to be administered by the Commission in making loans to carriers to meet expenditures on capital account, to refund maturing securities originally issued on capital account and for buying equipment and facilities and leasing or selling them to carriers.

This Court has recently had occasion to construe the Transportation Act. In *Wisconsin R. R. Commission v. C. B. & Q. R. R. Co.*, 257 U. S. 563, it was held that the act in seeking to render the interstate commerce railway system adequate to the country's needs had, by §§ 418 and 422, conferred on the Commission valid power and duty to raise the level of intrastate rates when it found that they were so low as to discriminate against interstate commerce and unduly to burden it. In the *New England Divisions Case*, 261 U. S. 184, it was held that under § 418 the Commission in making division of joint rates between groups of carriers might in the public interest consult the financial needs of a weaker group in order to maintain it in effective operation as part of an adequate transportation system, and give it a greater share of such rates if the share of the other group was adequate to avoid a confiscatory result.

In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. *The Daniel Ball*, 10 Wall. 557, 564; *County of Mobile v. Kimball*, 102 U. S. 691, 696, 697; *California v. Pacific R. R. Co.*, 127 U. S. 1, 39; *Wilson v. Shaw*, 204 U. S. 24, 33; *Second Employers' Liability Cases*, 223 U. S. 1, 47; *Luxton v. North River*

Bridge Co., 153 U. S. 525, 529. Mr. Justice Bradley, speaking for the Court in *California v. Pacific R. R. Co.* (p. 39), said:

"The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. . . . This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. . . . But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject."

If Congress may build railroads under the commerce clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service.

Title IV of the Transportation Act, embracing §§ 418 and 422, is carefully framed to achieve its expressly declared objects. Uniform rates enjoined for all shippers will tend to divide the business in proper proportion so that, when the burden is great, the railroad of each carrier will be used to its capacity. If the weaker roads were permitted to charge higher rates than their competitors, the business would seek the stronger roads with the lower rates, and congestion would follow. The directions given to the Commission in fixing uniform rates will tend to put them on a scale enabling a railroad of average efficiency among all the carriers of the section to earn the prescribed maximum return. Those who earn more must hold one-half of the excess primarily to preserve their sound economic condition and avoid wasteful expenditures and

unwise dividends. Those who earn less are to be given help by credit secured through a fund made up of the other half of the excess. By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net returns of railways, whether strong or weak, to the varying percentages which are fair respectively for them. The recapture clauses are thus the key provision of the whole plan.

Having regard to the property rights of the carriers and the interest of the shipping public, the validity of the plan depends on two propositions.

First. Rates which as a body enable all the railroads necessary to do the business of a rate territory or section, to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section. He with every other shipper similarly situated in the same section is vitally interested in having a system which can do all the business offered. If there is congestion, he suffers with the rest. He may, therefore, properly be required in the rates he pays to share with all other shippers of the same section the burden of maintaining an adequate railway capacity to do their business. This conclusion makes it unnecessary to discuss the question mooted whether shippers are deprived of constitutional rights when denied reasonable rates.

It should be noted that, in reaching a conclusion, upon this first proposition, we are only considering the general level of rates and their direct bearing upon the net return of the entire group. The statute does not require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. In such an inquiry, the Commission may have regard to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net return at all. Paragraph 17 of § 15a, makes this clear:

"The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section."

This last clause only prevents the shipper from objecting to a particular rate otherwise reasonable, on the ground that the net return from the whole body of rates is in excess of a fair percentage of profit, a circumstance that was never relevant in such an inquiry, as hereafter shown.

Second. The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled as of constitutional right to more than a fair net operating income upon the value of its properties which are being devoted to transportation. By investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he can not expect either high or speculative dividends but that his obligation limits him to only fair or reasonable profit. If the company owned the only railroad engaged in transportation in a given section and was doing all the business, this would be clear. If it receives a fair return on its property, why should it make any difference that other and competing railroads in the same section are permitted to receive higher rates for a service which it costs them more to render and from which they receive no better net return? Classification of railways in the matter of adjustment of rates has been sustained in numerous cases. In the *Minnesota Rate Cases*, 230 U. S. 352, 469, 473, it was held that the rates imposed by the State upon two railways were not confiscatory but that they were so in

the case of a third railway performing service in the same territory, because the latter was put to greater expense in rendering the service. An injunction was refused to the first two railways and was granted to the third. The same principle has been upheld in analogous cases. *Chicago, Burlington & Quincy R. R. Co. v. Iowa*, 94 U. S. 155; *Dow v. Beidelman*, 125 U. S. 680; *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339; *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, 549, 551; *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 590, *et seq.*

It is argued that to cut down the operating profit of the stronger roads to a certain per cent. is not cutting or reducing rates, since the net income of a carrier has no proper relation to rates and can not be used as evidence of their reasonableness. *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, and *Interstate Commerce Commission v. Union Pacific R. R. Co.* 222 U. S. 541, are cited to this point. They merely decide that where the reasonableness of one rate or a class of rates is in issue, the total operating profit of the railroad or public utility is of little use in reaching a conclusion. This is shown by the words of Mr. Justice Lamar, speaking for the Court, in *Interstate Commerce Commission v. Union Pacific R. R. Co.* (p. 549):

"Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article."

There is nothing in the act requiring the use of the net return as evidence to fix a particular rate. As we have already pointed out, paragraph 17, § 15a, gives fullest latitude for evidence on such an issue.

Reliance is also had on decisions of this Court in cases where the question was of the reasonableness of state rates, and it was held that evidence to show that the revenue of the carrier from both state and interstate commerce gave a fair profit, was not relevant. The State can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and on the other hand the carrier can not justify unreasonably high rates on domestic business on the ground that only in that way is it able to meet losses on its interstate business. *Minnesota Rate Cases*, 230 U. S. 352, 435; *Smyth v. Ames*, 169 U. S. 466, 541. But this conclusion does not make against the use of a fair return of operating profit as a standard of reasonableness of rates when the issue is as to the general level of all the rates received by the carrier.

The reduction of the net operating return provided by the recapture clause is, as near as may be, the same thing as if rates had all been reduced proportionately before collection. It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in determining whether the sum of the rates is fair. The investment is made on the faith of a profit, the profit accrues from the balance left after deducting expenses from the product of the rates, and the assumption is that the operation is economical and the expenditures are reasonably necessary. If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so. One obvious way to make the sum of the rates reasonable so far as the carrier is concerned is to reduce its profit to what is fair.

We have been greatly pressed with the argument that the cutting down of income actually received by the carrier for its service to a so-called fair return is a plain appropriation of its property without any compensation, that the income it receives for the use of its property is as much protected by the Fifth Amendment as the property itself. The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such a title to the excess as to render the recapture of it by the Government a taking without due process.

It is then objected that the Government has no right to retain one-half of the excess, since, if it does not belong to the carrier, it belongs to the shippers and should be returned to them. If it were valid, it is an objection which the carrier can not be heard to make. It would be soon enough to consider such a claim when made by the shipper. But it is not valid. The rates are reasonable from the standpoint of the shipper as we have shown, though their net product furnishes more than a fair return for the carrier. The excess caused by the discrepancy between the standard of reasonableness for the shipper and that for the carrier due to the necessity of maintaining uniform rates to be charged the shippers, may properly be appropriated by the Government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier. Yet it is made up of payments for service to the public in transportation, and so it is properly to be devoted to creating a fund for helping the weaker roads more effectively to discharge their public duties. Indirectly and ultimately this should benefit the shippers by bringing the weaker roads nearer in point of

economy and efficiency to the stronger roads and thus making it just and possible to reduce the uniform rates.

The third question for our consideration is whether the recapture clause, by reducing the net income from intrastate rates, invades the reserved power of the States and is in conflict with the Tenth Amendment. In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the States and the Nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established. *Minnesota Rate Cases*, 230 U. S. 352, 432, 433; *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473, 477; *The Shreveport Case*, 234 U. S. 342, 351; *Illinois Central R. R. Co. v. State Public Utilities Comm.*, 245 U. S. 493, 506; *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563. The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate transportation system as Congress has planned it. The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates which if present is indistinguishable.

It is further objected that no opportunity is given under § 15a for a judicial hearing as to whether the return fixed is a fair return. The steps prescribed in the act constitute a direct and indirect legislative fixing

of rates. No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for such an inquiry exists under §§ 208 and 211 of the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287.

The act fixes the fair return for the years here involved, 1920 and 1921, at five and a half per cent. and the Commission exercises its discretion to add one-half a per cent. The case of *Bluefield Water Works & Improvement Co. v. Public Service Commission*, 262 U. S. 679, is cited to show that a return of six per cent. on the property of a public utility is confiscatory. But six per cent. was not found confiscatory in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 48, 50; in *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 670; or in *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 172. Thus the question of the minimum of a fair percentage on value is shown to vary with the circumstances. Here we are relieved from considering the line between a fair return and confiscation, because under the provisions of the act and the reports made by the appellant the return which it will receive after paying one-half the excess to the Commission will be about eight per cent. on the reported value. This can hardly be called confiscatory. Moreover the appellant did not raise the issue of confiscation in its bill and it can not properly be said to be before us.

It is also said in argument that the value of the carrier's property upon which the net income was calculated was too low and was unfair to the carrier. The value of property, it is argued, really depends on the profit to be expected from its use, and should be calculated on the income from rates prevailing when the law was passed which

must be presumed to have been reasonable. The true value of the carrier's property would thus be shown to be so much higher than reported, that the actual return would be not higher than six per cent. of it and there would be no excess.

We do not think that, with the record as it is, such an argument is open to the appellant. It did allege that the values upon which the return was estimated were not the true values, but it did not allege what the true values were. This was not good pleading and did not properly tender the issue on the question of value. Under orders of the Commission, the carrier itself reported the values of its properties for 1920 and 1921, upon which the excesses of income were calculated. The bill averred that a return of these particular values was required under the orders of the Commission. This statement is not borne out by the orders themselves. They gave the carrier full opportunity to report any other values and to support them by evidence. This it did not do. We can not consider an issue of fact that was primarily at least committed by the act to the Commission, when the carrier has not invoked the decision of that tribunal.

The decree of the District Court is affirmed.